

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

STATE OF TEXAS, *et al.*,

Plaintiffs,

V.

UNITED STATES OF AMERICA, *et al.*,

Defendants,

and

KARLA PEREZ, *et al.*,

Defendant-Intervenors,

§ § § § § § § § § § § § § § § § § § § §

Case No. 1:18-CV-68

**APPENDIX IN SUPPORT OF OPPOSITION TO PLAINTIFFS' MOTION TO FILE A
SUR-REPLY OF DEFENDANT-INTERVENORS ELIZABETH DIAZ, ET AL.**

VOLUME 1
Exhibits 1–8

Dated: June 20, 2023

Respectfully Submitted,

**MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND**

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 20th day of June, 2023, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Nina Perales

Nina Perales

Exhibit	Description/Source	Vol. No.
1	Transcript of the motion proceedings for this case held in this Court on December 22, 2020	1
2	June 2018 email exchange between counsel for Plaintiffs, Defendants, and Defendant-Intervenors.	1
3	<i>Warrior Energy Servs. Corp. v. ATP Titan M/V</i> , 551 F. App'x 749 (5th Cir. 2014)	1
4	<i>Weems v. Hodnett</i> , No. 10-CV-1452, 2011 WL 2731263 (W.D. La. July 13, 2021)	1
5	<i>Civelli v. J.P. Morgan Chase Sec., LLC</i> , C.A. H-173739, 2023 WL 2825702 (S.D. Tex. Feb. 2, 2023)	1
6	Plaintiffs' Second Amended Responses to Defendant-Intervenors' Second Set of Discovery Requests, served on August 7, 2019	1
7	<i>Winfrey v. San Jacinto Cnty.</i> , 481 F. App'x 969 (5th Cir. 2012)	1
8	<i>Wojcik v. Memorial Hermann Health Sys.</i> , C.A. No. H-17-3198, 2019 WL 4887265 (S.D. Tex. Oct. 3, 2019)	1

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL 1:18-CV-00068

VS. HOUSTON, TEXAS

UNITED STATES OF AMERICA, ET
AL DECEMBER 22, 2020

TRANSCRIPT OF MOTION PROCEEDINGS
HEARD BEFORE THE HONORABLE ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography,
transcript produced via computer.

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22
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24
25

1 P R O C E E D I N G S

2 (Call to order of the court.)

3 THE COURT: Thank you. Be seated.

4 Good morning, Counsel.

10:12AM 5 We're here in the State of Texas versus United
6 States, 18-cv-68. Before we start, let me do a little
7 housekeeping.

8 First of all, I appreciate the fact that our
9 counsel from Washington and New Jersey came down here; and I
10:12AM 10 know there was a motion to, one, let them appear by phone; and,
11 two, to put off the hearing until early January.

12 We've had mixed results with phone, people trying
13 to argue by phone and especially with the fact that we set up
14 special lines so people could listen in. We were having
10:13AM 15 technology problems about letting some people argue but not
16 everybody unmute and argue at the same time and maybe people
17 that weren't lawyers arguing. So that's why we couldn't do it
18 by phone.

19 With regard to the hearing date, the general
10:13AM 20 consensus, at least here in the Southern District -- and I
21 don't know that anybody can really say what is what with regard
22 to COVID -- is that the COVID situation will be worse after the
23 holiday and it's better to do this before.

24 So we scheduled this to give enough distance away
10:13AM 25 from Thanksgiving but before Christmas. And so you can blame

1 me or COVID, whichever one you want to blame; but I appreciate
2 you being here.

3 As you can tell, we're trying to keep you as
4 socially distanced as possible. When you're talking, if you
10:14AM 5 want to take off your mask, you're welcome to. I have my mask
6 off, but I'm 6 feet away from everybody. Plus these guys are
7 around me all the time anyway so if I have it, they have it.

8 We have covers on the microphones and we replace
9 those every time so make sure -- I'm going to have you speak
10:14AM 10 from your tables so, like, for instance, Ms. Perales, you're
11 going to want to make sure that microphone is facing you.

12 We don't have -- of course this is the courtroom
13 with the least technology. We don't have -- you guys are just
14 going to have to speak loudly.

10:15AM 15 Anyway, I think we're all right there. I'm
16 looking out in the audience. We don't have many people here in
17 the audience, so I don't think we have to worry about social
18 distancing there.

19 Let me do, as I have in the past, some
10:15AM 20 preliminaries about really what we're here to talk about. I
21 mean, we're here to talk about whether DACA was legally
22 created. We're not talking about whether it's popular or
23 whether it's good policy or bad policy or, you know, whether
24 it's contrary to immigration policy as opposed to law. We are
10:15AM 25 talking about whether it's contrary to law.

1 We're not talking about issues of border security
2 or any of the other popular themes that seem to pervade our
3 press and newspapers. I mean, so let's stick to the facts
4 here.

10:16AM

5 As everyone here I think knows, to qualify for
6 DACA, you have to be in the country illegally. There are a
7 number of -- six or seven different qualifications you have to
8 go through to be a DACA recipient.

10:16AM

9 But I mention that one because I don't want
10 anybody to walk away from this hearing thinking lawyers for
11 Texas or lawyers for the government or lawyers for the DACA
12 recipients or the lawyers for New Jersey are speaking in the
13 pejorative if they use the term "illegal alien" or "illegal
14 immigrant."

10:17AM

15 As you know, the Fifth Circuit has actually said
16 that's the term that ought to be used when we talk about this
17 because it describes someone from one country who is present in
18 another country without complying with that second country's
19 immigration laws.

10:17AM

20 And so while it may not sound or be politically
21 correct in today's parlance, popular parlance, it does apply
22 here in a certain context. So I don't want anyone walking away
23 with the feeling that somebody on the other side is racist or
24 xenophobic or anti-immigrant just because they use the term
25 "illegal immigrant" or "illegal alien."

10:17AM

1 All right. That having been said, let's turn to
2 the actual merits of why we're here today. Procedurally we
3 have competing motions for summary judgment and I actually want
4 to start with the intervenors' motion first, the motion on
10:18AM 5 standing, unless there's some objection from any person, and
6 then circle back and take the State's motion for summary
7 judgment.

8 So who is going to take the lead on that?

9 MS. PERALES: Your Honor, Douglas Hallward-Driemeier
10:18AM 10 will argue defendant-intervenors' motion for summary judgment;
11 however, a question for the Court whether and when the Court
12 might want to hear oral argument on the *Daubert* motion or the
13 motion to exclude testimony for the summary judgment phase?

14 THE COURT: Why don't we do that first. Are you going
10:19AM 15 to argue that, Ms. Perales?

16 MS. PERALES: Yes, Your Honor.

17 THE COURT: All right. Why don't you lead off then.

18 MS. PERALES: Thank you, Your Honor.

19 Before I start, I would like to introduce an
10:19AM 20 attorney who came with me from MALDEF today, Samantha Serna
21 Uribe; and also one of the DACA Intervenors is here with us
22 today. Her name is Esther Jeon.

23 THE COURT: All right. Welcome to both of you.

24 MS. PERALES: Thank you, Your Honor.

10:19AM 25 In our filing, which is Docket 390, the

1 defendant-intervenors DACA recipients request that the Court
2 not consider the testimony of two experts put forward by the
3 plaintiffs, Mr. Donald Deere and -- sorry. Dr. Donald Deere
4 and Dr. Lloyd Potter.

10:20AM 5 When deciding motion for summary judgment, the
6 Court has the discretion to disregard an expert opinion that is
7 unreliable or irrelevant or both. And the case here of course
8 is *Munoz versus Orr*.

9 And in *Munoz*, the Court excluded expert testimony
10:20AM 10 at the summary judgment stage because the methods were not in
11 accord with other experts and also that he made mistakes,
12 failed to consider other variables and made assumptions that
13 drove his conclusions. We have very much the same situation
14 here as was presented in *Munoz*.

10:20AM 15 Dr. Deere is an economist. He testifies
16 primarily in wage and hour cases and employment discrimination
17 cases. He does not research or testify on the impact of
18 immigrants on the labor market. He is not qualified to offer
19 the conclusions that he does.

10:21AM 20 But more importantly, his conclusions are
21 speculative. He made assumptions about -- and this is with
22 respect to the interaction between the Affordable Care Act and
23 hiring of DACA recipients versus other authorized workers.

24 He only made assumptions, did no study of how
10:21AM 25 many businesses find themselves in this situation, how many

1 times any businesses have been faced with these equally
2 qualified candidates that are U.S. citizens and DACA that he
3 presented in his scenario.

4 He makes assumptions about how many hiring
10:21AM 5 managers know how the ACA penalty works, how many U.S. citizens
6 may or may not trigger the ACA penalty, when employers know --
7 at what point in the hiring process employers know somebody is
8 a DACA recipient.

9 He assumes further -- these are all assumptions
10:22AM 10 that he makes without any study at all -- that businesses would
11 favor a DACA recipient over a non-DACA recipient. He assumes
12 no other variables would affect the hiring decision and all
13 other factors in the economy would remain constant.

14 Most importantly, Dr. Deere was unable to
10:22AM 15 document a single instance of this happening. He didn't talk
16 to any employers. He didn't create any actual fact that
17 supports his conclusions.

18 And we would also like to point the Court to
19 *Hathaway versus Bazany*, which similarly excluded an expert's
10:22AM 20 testimony for making so many assumptions that the conclusion
21 itself was not reliable.

22 In addition, the conclusions are irrelevant in
23 the sense that Dr. Deere isn't able to say that even if this
24 were to happen based on all of his assumptions, that there
10:23AM 25 would be any pressure on the labor market. So qualifications,

1 the methodology and relevance are all present.

2 And similarly with the second expert, the
3 demographer, Dr. Lloyd Potter, whose testimony is presented to
4 argue that people will leave the state or leave the plaintiff
10:23AM 5 states if they lose their DACA, Dr. Potter is not qualified to
6 render opinions having to do with immigrant demography or the
7 reasons why immigrants may stay or choose to leave the
8 United States.

9 And he makes one central and incorrect assumption
10:23AM 10 which dooms his analysis. Dr. Potter conceded that he assumed
11 that if somebody lost their work authorization, they would be
12 unable to work in the United States; and that's not true.

13 When you lose your work authorization, you can
14 still work in the United States. You can work in a business
10:24AM 15 that you own. You can work in your family business that's
16 owned by your family. You can work as an independent
17 contractor. You can mow lawns for money.

18 And Dr. Potter conceded that he hadn't thought
19 about any of those possibilities and ultimately he testified,
10:24AM 20 quote, well, I hadn't really kind of thought the whole thing
21 through, unquote.

22 His work further --

23 THE COURT: Would working for your family be legal?

24 MS. PERALES: If your family owns a restaurant, let's
10:24AM 25 say, Your Honor, in the example that I gave and you're working

1 with your family members in the restaurant and you're not
2 work-authorized, yes, the work would be legal as long as you're
3 not --

4 THE COURT: Would your family be breaking the law by
5 hiring you?

6 MS. PERALES: If you're not an employee, no,
7 Your Honor.

8 THE COURT: Okay. I'm missing that. You are making a
9 distinction between working and not an employee and I missed
10 that distinction.

11 MS. PERALES: That's right, Your Honor, because not all
12 work is performed as an employee of the business. If you're
13 self-employed or you're working with your family, not as an
14 employee but in a joint effort to run whatever enterprise is
15 being run, then your work is not unlawful and your parents are
16 not breaking the law by having you work with them.

17 THE COURT: So if I owned a restaurant and my son is in
18 the country illegally and doesn't have work authorization, I
19 can still hire him to be a waiter in my restaurant?

20 MS. PERALES: As long as he's not an employee, yes,
21 Your Honor.

22 THE COURT: So if he's, what, an independent
23 contractor?

24 MS. PERALES: He could be or he could just be helping
25 out and you could be supporting him. As long as he's not an

1 employee, his work authorization or lack thereof doesn't come
2 into play.

3 THE COURT: So if he was basically working for free,
4 just for the family good to help support the family and I
10:26AM 5 wasn't paying him a salary, then I, as the employer, would not
6 be illegal, breaking the law by hiring him?

7 MS. PERALES: That's correct.

8 THE COURT: Okay. Go ahead.

9 MS. PERALES: And so because Dr. Potter made this very
10:26AM 10 flawed assumption, he eventually conceded that he hadn't really
11 thought the whole issue through.

12 But in addition to that, his analysis is purely
13 based on speculation. In his deposition, he agreed that he had
14 no studies or information, either his own information or
10:26AM 15 other's information, about DACA recipients' likelihood of
16 return if they lost DACA.

17 He relied on eight articles. They don't support
18 his conclusion. The articles that he relied on don't study
19 undocumented immigrants, did not study Texas, did not study
10:27AM 20 states with different work authorization verification schemes,
21 and did not analyze populations similar to DACA recipients.

22 Now, ultimately he expressed his opinion as the
23 idea that quote/unquote some people might return and when
24 pressed for a number, he testified somewhere between one and
10:27AM 25 everybody. That testimony really reveals how speculative and

1 unsupported his analysis was.

2 Now, the Court said in its order on Docket 452
3 that the Court would treat the points raised in our motion as
4 objections to the expert testimony for the pending summary
10:27AM 5 judgment motion; and for that reason, we've reasserted the
6 motion in our response to the motion for summary judgment.

7 Now, the plaintiffs have responded in part going
8 to the weight and Mr. Disher will give his argument on that.
9 But the plaintiffs wrote in their response, which is at
10:28AM 10 Docket 411, quote, defendant-intervenors' arguments are better
11 resolved through cross-examination and contrary evidence than
12 in a motion such as this.

13 And we'll get to their response to summary
14 judgment a little bit later; but I wanted to point that out
10:28AM 15 because I think even the plaintiffs at this point have taken
16 the position that if there is competing evidence, even if the
17 Court doesn't completely exclude these experts, that a trial is
18 really the necessary forum to work out the weight or the
19 credibility of the experts.

10:28AM 20 Thank you.

21 THE COURT: Mr. Disher, who wants to reply from your
22 side?

23 MR. DISHER: Thank you, Your Honor. Todd Disher for
24 the plaintiff states.

10:29AM 25 Just a brief introduction. With me today is

1 Mr. Eric Hudson with our office as well as Elizabeth Murrill.
2 She is the solicitor general for the great State of Louisiana.

3 So just a couple of points in response to the
4 *Daubert* motion. Of course, we filed a written reply which the
5 Court can review.

6 Obviously we're here on a motion for summary
7 judgment and as the Court weighs and considers our motion for
8 summary judgment, the Court can of course give the weight that
9 is due to the various expert testimony and expert declarations.
10 There's no need for the Court to resolve the motion to strike
11 at this point. The Court will be presumed, in fact, to have
12 given it the weight that it's due.

13 Additionally the two conclusions from our experts
14 are, in fact, confirmed by many of the other witnesses in this
15 case as well as the plaintiffs' own expert.

16 First with Dr. Deere, the defendant-intervenors,
17 for example, have offered an opinion from Ike Brannon. During
18 his deposition, Ike Brannon -- this is, again, all laid out in
19 our motion and various points in our pleadings -- Dr. Ike
20 Brannon confirmed what Dr. Deere said that for certain lawfully
21 present workers, be they citizens or other folks who are
22 lawfully present to work here, having the DACA recipients be
23 eligible to work, in fact, does increase competition for at
24 least certain segments of the population.

25 As far as Dr. Potter is concerned, this Court is

1 well aware of the survey from Dr. Wong -- again, an expert by
2 both the DACA Intervenor as well as the state of New Jersey --
3 who did a survey of DACA recipients and in his survey found
4 that a substantial portion of them were either highly likely or
5 somewhat likely to leave the country should DACA end.

6 I would also simply point out, as we have before,
7 that the defendant-intervenor has never once said should DACA
8 end all of the DACA recipients will stay in the country. They
9 have never once said that.

10 And so Dr. Potter's declaration stands for the
11 very common sense principle that should DACA end and these
12 folks no longer be able to work here lawfully -- some of them
13 may be able to be supported by their family members, some of
14 them who are highly educated and qualified may not want to do
15 that -- so a certain percentage of them would likely leave the
16 country.

17 So, again, the Court can evaluate all of that
18 evidence for itself and give it the weight that it's due as the
19 Court has already done in ruling on our motion for preliminary
20 injunction citing to Dr. Deere's very basic proposition of
21 black-letter law that the ACA mandate does not apply to DACA
22 recipients as well as Dr. Potter's conclusion, which is of
23 course confirmed by the defendant-intervenor's own expert.

24 So we would just ask the Court to consider all of
25 that when it is ruling on the motion for summary judgment and

1 give it the weight that it's due. There's no need to resolve
2 that issue on a motion to exclude the expert testimony.

3 THE COURT: What do I do -- and, Mr. Disher, I'm asking
4 you; but I'm going to let Ms. Perales think about it and let
5 her respond to this too.

6 What do I do with the fact that, in theory at
7 least, if there's no DACA all the DACA recipients are removable
8 aliens and presumably should be removed if they're following
9 the INA -- if the government is following the INA? I mean,
10 doesn't that prove Dr. Potter's theory?

11 MR. DISHER: It does, Your Honor. Again, we can't
12 quantify how many DHS is likely to remove at this point given
13 their limited resources; but, again, I think it is a very, you
14 know, indisputable idea that should DACA end, some percentage
15 of DACA recipients will leave the country whether it's
16 voluntarily or through some removable action.

17 THE COURT: All right. Thank you, Mr. Disher.

18 Ms. Perales, you want to weigh in on the question
19 I just asked? So I mean, in theory to be a DACA recipient, you
20 either overstayed your visa or you came in the country
21 illegally. And I think, at least when I looked at it last, it
22 was about 50/50 how people fell into those two categories.

23 I mean, either way, you would be removable; so
24 wouldn't the proof be in the pudding that if the government was
25 actually doing its job as that job is laid out in the INA,

1 those people would be removed, whether as Mr. Disher said,
2 voluntarily or involuntarily?

3 MS. PERALES: Two answers for that, Your Honor, before
4 I get to the reply portion of what I wanted to say. First of
10:33AM 5 all, and I hope I get a chance to talk about this a little bit
6 later in response to the motion for summary judgment, but DACA
7 recipients are removable even when they're DACA recipients.
8 Having DACA or having deferred action doesn't change the fact
9 that you are removable or that you are undocumented.

10:34AM 10 THE COURT: But they have legal presence under DACA?

11 MS. PERALES: Yes, and I hope to discuss that a little
12 bit later with Your Honor as well. They have not legal
13 presence but lawful presence as that term has been coined.

14 So as to the second part of what I wanted to say,
10:34AM 15 DACA recipients have been here for a while. They have been out
16 of status for a while. If they were to lose DACA, the most
17 reasonable expectation is that they would continue in that
18 state of being present and lacking immigration status and
19 that's the state that they were in before they received DACA.

10:34AM 20 The fact that somebody is removable doesn't mean
21 that they are immediately placed in removal proceedings and I
22 think Mr. Disher acknowledged that to some degree. And so it
23 does not support Dr. Potter's otherwise completely unsupported
24 speculation that people would leave -- perhaps one, perhaps
10:35AM 25 all. He has no information and produced no information about

1 people leaving or their likelihood of leaving.

2 I would like to respond to plaintiffs' contention
3 which they have sort of made a theme in this litigation that
4 somehow the defendant-intervenors' experts testified in support
10:35AM 5 of plaintiffs' position. There's plaintiffs' theme that
6 defendant-intervenors' experts have supported plaintiffs'
7 position.

8 And I want to point out that with respect to the
9 ACA and the competition and the DACA recipient purportedly
10:36AM 10 being hired instead of a U.S.-born worker, Dr. Perryman
11 expressed that he, quote, does not know one way or the other,
12 unquote, whether an employer has ever hired a DACA recipient
13 for a job that a U.S. citizen also applied for.

14 Dr. Brannon referenced statements regarding only
10:36AM 15 general economic principles rather than any actual empirical
16 evidence of DACA's effects on wages.

17 Dr. Perryman, who is often raised by the
18 plaintiffs, testified that he has no information that there are
19 DACA recipients competing for low-skill jobs with non-DACA
10:36AM 20 workers.

21 And then finally Dr. Ku, who is an expert on the
22 ACA, said that there has not been any overall decline in
23 employment for U.S.-born workers following implementation of
24 DACA and the ACA.

10:37AM 25 So there's just no support for what Dr. Deere is

1 saying, and there's also no support for what Dr. Potter is
2 saying.

3 Now, plaintiffs refer to Dr. Wong who is not our
4 expert. So for the purpose of this, the defendant-intervenors
10:37AM 5 can't be collapsed into one entity. In fact, our expert,
6 Dr. Perryman, has testified why the statement of Dr. Wong is
7 not reliable and should not be used to counteract the
8 statements of Dr. Potter.

9 And my colleague, Mr. Hallward-Driemeier, has
10:37AM 10 more on that with his portion of the argument.

11 So, Your Honor, these two expert reports don't
12 meet the standards for expert testimony. They should be
13 excluded; and at the very least, they are part of a serious
14 dispute over material facts that would preclude summary
10:38AM 15 judgment on these questions.

16 THE COURT: Mr. Feigenbaum, do you have a dog in this
17 fight?

18 MR. FEIGENBAUM: Thank you, Your Honor.

19 New Jersey is deferring to the DACA intervenor
10:38AM 20 defendants and their counsel for discussing this motion. We
21 agree with them and we agree that the evidence presented in
22 this will ultimately go to both Mr. Hallward Driemeier's motion
23 and the plaintiff state's motion. We shouldn't be relying on
24 those experts.

10:38AM 25 THE COURT: All right. Mr. Coghlan, you or Mr. Hu want

1 to weigh in?

2 MR. COGHLAN: Just briefly, Your Honor.

3 Your Honor, as defendants at the outset of this,
4 the federal defendants have pointed out they disagree that this
10:38AM 5 Court has *parens patriae* standing, but we also recognize the
6 Court has found that.

7 But on the standing issue, Your Honor, you know,
8 the federal defendants' view is that even if these experts are
9 excluded there, that would not change the Court's analysis as
10:38AM 10 previously ruled. It's noted that it relied on Dr. Wong's
11 statements and finding that there was standing and so federal
12 defendants' view is that it would not necessarily change the
13 Court's analysis regardless of its --

14 THE COURT REPORTER: Regardless of its?

10:39AM 15 MR. COGHLAN: Regardless of its ultimate decision on
16 these experts.

17 But we also agree with counsel for Texas that the
18 Court can grant whatever weight it determines appropriate as to
19 each of their testimony.

10:39AM 20 THE COURT: Okay. All right. Let's shift over then
21 and talk about standing. Is it Hayward? Hallward?

22 MR. HALLWARD-DRIEMEIER: It's Hallward-Driemeier, a
23 mouthful if ever there was one.

24 THE COURT: I'm missing an "I" on the "meier" part. I
10:39AM 25 had a cheat sheet here and I was trying to read it.

1 MR. HALLWARD-DRIEMEIER: It is hard enough when it is
2 spelled correctly. It is even more difficult when not.

3 Well, I'm happy to be following Ms. Perales
4 because I'll certainly rely on much of what she said and
10:40AM 5 incorporate it into my own arguments.

6 I have three primary points. The first is how
7 the standing issue differs from the Court's earlier decision in
8 the DAPA case, the Fifth Circuit's decision in the DAPA case.

9 The second is how the standing issue now differs
10:40AM 10 from the Court's decision on the preliminary injunction
11 decision.

12 And the third is how it differs from
13 *Massachusetts v. EPA*. Those generally map on to the driver's
14 license cost, the DAPA decision. The health care and schooling
10:40AM 15 costs, that's the PI. And then the sort of *parens patriae*
16 issue or the special solicitude, that's the *Massachusetts*
17 decision.

18 Starting with driver's licenses, both this Court
19 and the Fifth Circuit specifically relied on the very concrete,
10:41AM 20 specific evidence that was provided in the DAPA litigation
21 about a direct cost to the State of Texas as a consequence of
22 DAPA and that was estimated in declarations to be between 130
23 and 170 --

24 Yes, Your Honor.

10:41AM 25 THE COURT: (Addressing the court reporter.) He's

1 saying "DAPA" with a D-A-P-A as opposed to "DACA."

2 THE COURT REPORTER: Thank you.

3 MR. HALLWARD-DRIEMEIER: Thank you, Your Honor, for
4 that clarification. The record will be much better for it.

10:41AM

5 So in the Fifth Circuit's decision, the Court of
6 Appeals specifically said that it was only relying on that very
7 specific evidence of a very direct cost and that's at 809 F.3d
8 at Page 150.

10:42AM

9 Here by contrast, although it was initially pled
10 in the complaint, the plaintiffs have specifically disavowed
11 that they are making that argument relying on that evidence in
12 this case. There was initially a document that was submitted
13 that included some of the declarations from the DAPA
14 litigation, but the Court granted our motion to exclude those
15 undisclosed witnesses and that was Docket 318.

10:42AM

16 And I'll note also that at Docket 105 at Page 3,
17 the plaintiffs specifically represented that they were, quote,
18 not relying on the Peters declaration in support of their PI.
19 So the specific cost that was relied on by the Court in that
20 litigation is not present here.

10:42AM

21 At the PI stage, the Court did rely on some
22 different types of expenses and those related to health care
23 and education. Now, I'll note that in the DAPA litigation the
24 Court did not find those costs to be supportive of standing
25 because the Court noted that they were indirect damages and

10:43AM

1 moreover that they were not caused by DAPA and that's at 86
2 F.Supp.3d at 634.

3 THE COURT: Of course DAPA hadn't been enacted at that
4 point. It wasn't in existence.

10:43AM

5 MR. HALLWARD-DRIEMEIER: That's true. There was yet
6 another problem of speculation at that time.

10:44AM

7 But primarily the Court was relying on the fact
8 that those costs, health care and education, derived from the
9 presence of the individual rather than their lawful presence
10 and as a consequence there was both a causation and
11 redressability problem with relying on that and that's again at
12 Page 634 and 635.

10:44AM

13 THE COURT: What do I do with -- and I'll ask the same
14 question I asked Ms. Perales and Mr. Disher a minute ago. And
15 throughout the briefing, the intervenors' attack on the States'
16 evidence has been, well, you've got evidence of what illegal
17 immigrants may cause but you haven't split them out between
18 DACA and immigrants, other immigrants.

10:44AM

19 What do I do with the fact that Mr. Disher comes
20 back and says, well, if the -- under his take care claim, if
21 the federal government was doing what the INA told them to do,
22 there wouldn't be either one of them here and we would save all
23 of that money?

10:45AM

24 MR. HALLWARD-DRIEMEIER: Well, Your Honor, with respect
25 to that claim, as we've noted in our papers, Congress only

1 appropriates enough resources for the government to remove a
2 very small fraction of the some 11 to 12 million undocumented
3 immigrants in the country in any given year.

4 And so it's not a failure to take care when
10:45AM 5 because of the appropriations that are available, the executive
6 by necessity has to prioritize among those --

7 THE COURT: And let's say I agree with that argument.
8 I can tell you the judiciary wishes they would have
9 appropriated more money to us. We would have better acoustics
10:46AM 10 in this courtroom.

11 But doesn't that play into them saying, okay,
12 that's fine and good. They're not going to deport or remove
13 these people, but we still have to pay all the costs for them.

14 I mean, you can't have your cake and eat it too.
10:46AM 15 You can't say they're going to stay if DACA is removed and
16 there's not -- but there's not a cost involved in that.

17 MR. HALLWARD-DRIEMEIER: Well, Your Honor, just to be
18 clear, my argument is that there's not a cost to their
19 presence. Of course we believe that the overall benefits
10:46AM 20 outweigh the costs.

21 THE COURT: No, I understand that. That's very clear
22 from your briefs.

23 MR. HALLWARD-DRIEMEIER: But with respect to costs,
24 we're not disagreeing that there are costs of presence,
10:46AM 25 although that has not been identified by any of their

1 witnesses. They specifically disclaim tracking that or having
2 any idea of what that amount would be. That was Smoot and
3 Lopez. Smoot with respect to health care and Lopez with
4 respect to education specifically said they did not track DACA
10:47AM 5 recipients. They did not have an idea what that number would
6 be.

7 But with respect --

8 THE COURT: Well, it's impossible for them to do that,
9 isn't it?

10:47AM 10 MR. HALLWARD-DRIEMEIER: Well, it would not be
11 impossible if they were to track who was a DACA recipient and
12 who was not. They don't because --

13 THE COURT: Well, they don't know who is and who isn't.

14 MR. HALLWARD-DRIEMEIER: Well, Your Honor, they're the
10:47AM 15 party bringing the case. They have the burden of demonstrating
16 their standing. They are the ones that have to come forward
17 with that evidence and they have not.

18 But my point earlier that I was making was that
19 it was the same point that this Court made in the DAPA
10:47AM 20 litigation, that there was a failure of proof as to causation
21 and remedy because at most what the States had shown was that
22 there was a cost associated on average perhaps or
23 hypothetically with respect to some of presence and the
24 elimination of DAPA would not address those individuals'
10:48AM 25 presence in the state.

1 *Plyler versus Doe* says that the State has to
2 educate the student-age population whether they are here
3 lawfully or not. So those students, if they are here, are
4 going to be educated whether DACA exists or is set aside and
5 so --

10:48AM

6 THE COURT: But if they're not here?

7 MR. HALLWARD-DRIEMEIER: Well, Your Honor, so that
8 goes -- there are several arguments that we would make with
9 respect to that.

10:48AM

10 You're right to say that the State -- that Texas
11 tries to fill the gap by suggesting that they would
12 self-remove.

13 THE COURT: Or the government could remove them.

10:49AM

14 MR. HALLWARD-DRIEMEIER: Well, Your Honor, of course
15 the idea that the government would remove, we've already noted
16 that the government's resources are only sufficient to remove a
17 very small percentage. Your Honor --

18 THE COURT: But I agree with that, but that doesn't
19 lessen the burden on the States, does it?

10:49AM

20 MR. HALLWARD-DRIEMEIER: Well, it lessens --

21 THE COURT: I mean, they still have to educate those
22 people because the Supreme Court has told them they have to do
23 it.

10:49AM

24 MR. HALLWARD-DRIEMEIER: What it does, Your Honor, is
25 it breaks the chain of causation between their costs and the

1 existence of DACA and it breaks the argument that they have
2 with respect to --

3 THE COURT: Why? That I'm not following. Why does
4 that --

10:49AM

5 MR. HALLWARD-DRIEMEIER: Because DACA is not
6 responsible for their presence. If the cost is a consequence
7 of the student's presence and DACA --

10:49AM

8 THE COURT: Tell me how it's not responsible for their
9 presence because it gives them legal presence and so they're
10 not being removed, in theory at least, because they have DACA
11 status.

10:50AM

12 MR. HALLWARD-DRIEMEIER: No, Your Honor. And I go back
13 to the Court's own analysis in the DAPA litigation. Absence of
14 DACA does not equate to the federal government removing those
15 individuals. In fact, every piece of evidence would suggest
16 that they would not be removed.

10:50AM

17 Why? Because, again, the federal government has
18 to prioritize and these individuals are the ones that would be
19 least prioritized and that's because they are in school,
20 they're just --

21 THE COURT: No. I agree with you on that. But doesn't
22 that -- setting aside the standing, isn't the argument you just
23 made, doesn't that prove his take care claim? I mean, you're
24 just arguing their take care claim for them.

10:50AM

25 MR. HALLWARD-DRIEMEIER: No, Your Honor. Again, I

1 think not. And I go back to the fact that there is not enough
2 appropriated at Congress for the executive to remove all
3 persons who are not here lawfully or even a substantial number
4 of them.

10:51AM 5 THE COURT: Is that the State's fault though? You see,
6 the problem is that's all in the province and the federal
7 government is saying, States, you can't do this. You can't
8 deport people. You can't have your own immigration laws. You
9 can't make presence in the state illegal. I mean, all this has
10:51AM 10 been basically -- I'm using the word "preempted," but that's
11 probably an incorrect usage of the word.

12 But it's all been gobbled up by the federal
13 government because they've said, okay. Immigration is a
14 federal -- you know, it's their deal. They can run it.
10:51AM 15 States, you can't run it.

16 So when you say -- and this is not a rhetorical
17 question; this is a question. When you say, okay. We don't
18 have the money to do it even though their presence causes the
19 States damage, for a standing argument, doesn't that give them
10:51AM 20 damage?

21 MR. HALLWARD-DRIEMEIER: Well, so, Your Honor, I would
22 like to separate two things out here and maybe I'll jump right
23 now because it seems most responsive to your question to the
24 *parens patriae* or special solicitude type of arguments that
10:52AM 25 they're making in reliance on *Massachusetts v. EPA*.

1 I think we all agree and I think it's evident in
2 Your Honor's PI opinion that *Massachusetts v. EPA*, first of all
3 is very unclear exactly what its holding is; and secondly I
4 would posit -- and I think I see some recognition of this in
5 Your Honor's opinion -- that that is the outer bounds. The
6 majority of the Supreme Court now is not going to take it any
7 further.

8 And *Massachusetts v. EPA* does not support
9 standing by Texas --

10 THE COURT: Haven't they taken it further with all
11 these cases against the Trump administration?

12 MR. HALLWARD-DRIEMEIER: Your Honor, no. There are
13 specific --

14 THE COURT: I mean, I was hoping -- when I heard
15 Roberts was writing the *Regents* opinion, I was hoping it would
16 be on standing, but it wasn't.

17 MR. HALLWARD-DRIEMEIER: Well, there's a difference
18 when a particular school has particular students in which it's
19 invested and those are going to be taken. That's a very
20 different notion than the *parens patriae* standing. That's a
21 direct harm -- the type that this Court identified in the DAPA
22 litigation, the Fifth Circuit did. It's not *parens patriae*.

23 When you're talking about *parens patriae*, both in
24 *Massachusetts v. EPA*, the Court talked about it as a harm that
25 affects the State as a whole. In that instance it was the

1 State's sovereign territory. Literally its boundaries were
2 washing away, its coastline.

3 In the *Alfred Snapp* case, it refers to an injury
4 to the residents of the state in general. But in here so if
10:53AM 5 you're talking about that, well, then you do have to look at
6 what is the harm to the State in general?

7 And the Supreme Court's decision in the *Regents*
8 case actually directly contradicts that. In *Regents*, the Court
9 stresses the benefit of DACA to the State as a whole. It notes
10:54AM 10 that the consequences of rescission would radiate out to
11 families including citizens, U.S. citizen children, to the
12 schools that these recipients attend; to the health care
13 providers --

14 THE COURT: But isn't their argument just the flip side
10:54AM 15 of that? Isn't their argument that that's the cost? We have
16 the cost of that to the school; you know, to our general
17 population.

18 Go ahead. I'm sorry.

19 MR. HALLWARD-DRIEMEIER: Well, again, if we're talking
10:54AM 20 about the sort of state as a whole, what DACA -- what the
21 *Regents* decision talks about is that rescinding DAPA would
22 constitute a loss of 215 billion in economic activity, 60
23 billion in federal taxes, and one and a quarter billion in
24 state taxes.

10:55AM 25 So there's not an injury to the state as a whole

1 from DACA. In fact, this is an instance of the State cutting
2 off its nose to spite its face in order to litigate a policy
3 difference with the federal government and that has never been
4 upheld as a basis for *parens patriae* standing.

10:55AM 5 So I think with respect to *parens patriae*, the
6 type of injury they assert is not the type that has ever been
7 recognized. In fact, the Supreme Court's decision in *Regents*
8 suggests that there's a benefit to the State as a whole. They
9 are trying in effect to assert an interest as between
10:55AM 10 individuals.

11 Even if you assume that there are some
12 individuals who lose out in the job to others, there are many,
13 many people in the state of Texas who benefit from it and
14 that's never been a situation where *parens patriae* standing has
10:55AM 15 been allowed.

16 But with respect to, again, going back to these
17 questions of the health care costs, the education costs and the
18 like, what the State is assuming, what its declarants have
19 assumed, is that the loss of work authorization means they
10:56AM 20 would depart the United States and that's what Dr. Potter
21 testified.

22 But there's no basis for that as Ms. Perales
23 discussed at length. There was assumption upon assumption upon
24 assumption. And specifically when Dr. Potter was asked how
10:56AM 25 many, you know, anywhere between two and all, he said to say

1 anymore, quote, would be speculation. And that's at Page 878
2 of Document 225-5. So there is no basis upon which to conclude
3 that people would depart.

4 But there's more that I would want to emphasize.
10:56AM 5 Two things more. The first is that the *Regents* decision itself
6 further undermines any such assumption of causation and that's
7 because it stresses that there's a difference between the
8 benefits and forbearance of removal and so one can't assume
9 that there would be removal of individuals even if they lost
10:57AM 10 the work authorization.

11 And furthermore there's no reason to think that
12 those individuals, now that they know that, would self-remove.

13 THE COURT: Why can't a witness or a Court for that
14 matter assume that the law will be complied with?

10:57AM 15 MR. HALLWARD-DRIEMEIER: Well, Your Honor, we're
16 dealing with a population that is already present without
17 documentation and the question is whether they would
18 self-remove.

19 THE COURT: Or not self-remove but be removed.

10:57AM 20 MR. HALLWARD-DRIEMEIER: Well, Your Honor, we know from
21 history that the federal government does not have the resources
22 to remove all of the individuals and so they're not going to be
23 removed. And this was precisely why the Court found there was
24 a lack of causation and redressability in DAPA.

10:58AM 25 And I want to point out one other thing and that

1 is even if one assumes that some people -- now, of course, they
2 rely on Professor Wong's survey for this. Dr. Perryman or
3 Mr. Perryman had pointed out the flaws in the methodology in
4 terms of the way the survey was built. We don't believe that
10:58AM 5 that is reliable and we certainly don't believe there's a basis
6 for summary judgment there because that would have to be put to
7 I think the witnesses' testimony and cross-examination but
8 certainly we have challenged that conclusion.

9 But even if one were to take that for granted, it
10:58AM 10 matters who would self-remove because Mr. Potter -- Dr. Potter
11 in his own deposition testimony acknowledged that families with
12 young children who are enrolled in school would be less likely
13 to remove themselves and so you're not going to see a
14 diminution in education expenses.

10:59AM 15 He said that the individuals who would be more
16 likely to self-remove might be college graduates. Well, the
17 college graduates are not the ones who are relying on Texas's
18 emergency health care expenditures.

19 So there's a dissonance between who might, even
10:59AM 20 in speculating, self-remove and what the costs are that Texas
21 says it is incurring. And so therefore this is both
22 contradicted. It is contrary to what -- the premise of this is
23 contrary to what the Supreme Court said in *Regents* in terms of
24 equating loss of work authorization and departure or removal
11:00AM 25 from the United States.

1 And finally it assumes that the departures, even
2 if they were to happen, are evenly distributed whereas what we
3 know is that the ones who would stay are the ones who are more
4 likely causing any costs if there are any.

11:00AM

5 So I think for all of those reasons, Texas has at
6 the very least failed to carry its burden in its summary
7 judgment and we believe we have, in fact, carried our burden
8 for summary judgment on those issues.

11:00AM

9 THE COURT: All right. Mr. Feigenbaum, do you want to
10 weigh in on that?

11 MR. FEIGENBAUM: Yes. Thank you, Your Honor.

12 THE COURT: I'm going to let you go and then go and you
13 can both beat up on Mr. Disher and then I'll let Mr. Disher go.

14 MR. FEIGENBAUM: I think he can handle that.

11:01AM

15 So I just have three quick points understanding
16 that the counsel for DACA intervenors have covered the majority
17 of their motion just to respond to some of the questions that
18 Your Honor had about this issue.

11:01AM

19 So first on causation and redressability, again,
20 I think that Mr. Hallward-Driemeier hopefully identified that
21 the question is not about whether or not someone here has
22 lawful presence, but whether or not they're simply going to
23 remain in any of the plaintiff states.

11:01AM

24 And as a result, the question as a fact matter is
25 whether or not they're likely to still be there even if the

1 plaintiff states prevail and there is some sort of relief or
2 injunction entered against DACA.

3 And we think that the record is insufficient to
4 demonstrate that, certainly for them on summary judgment, in
11:01AM 5 favor of the DACA intervenors in the other direction because
6 they're not challenging the failure of Congress to appropriate
7 sufficient money in order to remove everyone.

8 Your Honor had, I think, some helpful questions
9 that got to, well, is there some sort of take care problem with
11:01AM 10 the fact that not everyone who is here without documentation
11 could ultimately be removed and as everyone agrees, it's just a
12 real fraction of that.

13 But of course the answer to that question,
14 whether there's a take care problem with the lack of
11:02AM 15 appropriation would be a resounding no, which is why plaintiff
16 states aren't bringing them here.

17 Congress all the time does not appropriate enough
18 money to enforce the law against all individuals who may be
19 violating it, whether that's in the immigration context,
11:02AM 20 whether that's in the drug context, whatever sort of law
21 enforcement context you want to pick. It's never a take care
22 problem that Congress has not appropriated enough money to
23 fully remedy whatever perceived violations of the law or actual
24 violations of the law there may be.

11:02AM 25 But that's the hook that would tie to whether or

1 not someone is actually remaining in plaintiff states in
2 violation of the law is whether there's actually going to be
3 the enforcement apparatus and the funding to remove them.

4 So I think that helps to explain where there is a
11:02AM 5 break sufficient for the causation and redressability prong,
6 that's different between what DACA does and what the failure to
7 appropriate does and as a result why there may be standing on
8 these facts to go after the appropriations themselves and the
9 failure to appropriate enough money. But again there's just no
11:03AM 10 constitutional or legal claim against that decision by
11 Congress.

12 The second point, and I think maybe New Jersey is
13 well situated to talk about this one, is that we think this
14 isn't at all like *Regents*. I heard Your Honor ask, well, if
11:03AM 15 there was standing in a case like *Regents*, doesn't there sort
16 of have to be standing in a case like this?

17 But I think there's plenty of examples all the
18 time where you would have standing in one situation but not
19 standing in another.

11:03AM 20 So, for example, in the employment context if
21 someone is applying for a job and doesn't get it and they think
22 they were discriminated against in that process, they clearly
23 have standing in order to bring the Title VII claim about
24 whether or not they should have gotten the job. Whether or not
11:03AM 25 they win will be a separate issue.

1 If someone else says, well, you hired Person X
2 and so I'm suing because you hired Person X, that's a very
3 different inquiry and you may not have standing to challenge
4 Person X's hiring if the defendant can show as a matter of fact
5 that actually you wouldn't have been hired anyway.

11:04AM

6 THE COURT: Let me ask you a question because you raise
7 an interesting point. Let's say you and I are in an accident
8 and I caused the accident and you sued me and my defense is you
9 weren't hurt, all right? Is there a difference in the fact
10 that you have standing to sue me but maybe I win on causation
11 and damages? So is there a difference between -- are you
12 really arguing causation or are you really arguing standing?

11:04AM

13 MR. FEIGENBAUM: So I think that it depends. I mean
14 obviously we think that causation is part of the broader
15 standing just like the injury prong. So I think with that
16 hypothetical, you're positing someone that doesn't show any
17 injury whatsoever and we think of course that the DACA
18 intervenor counsel has walked through why there hasn't been a
19 substantiated injury at all.

11:05AM

20 My point is even if you think there might be an
21 injury, maybe you're pointing to the wrong thing; so maybe the
22 analogy to use the car example --

11:05AM

23 THE COURT: That was probably a bad analogy really.

24 MR. FEIGENBAUM: No. I wanted to do that thing lawyers
25 do where they modify it in the way it helps them.

11:05AM

1 But ultimately I think the point here even if you
2 think there may be some tangible injury from a DACA recipient
3 remaining in the country and remaining in plaintiff states,
4 there need to be facts that show that that is linked to DACA
5 itself.

6 And given the lack of appropriations and given
7 what we all agree is true in this case as a matter of fact
8 which is that there cannot possibly be enough people that would
9 be removed to meet the entire population of undocumented
10 individuals -- adults or who arrived here as children -- that I
11 think that does become more of a causation and redressability
12 problem. We're not really talking about DACA. We're really
13 talking about the appropriations.

14 And then the third point that I wanted to make
15 just briefly is that whatever this Court ultimately concludes
16 about the standing motion itself -- and we'll get to this when
17 we talk about the remedy at the end of the last motion that
18 we're talking about -- but I do think it should also bear on
19 the remedy that this Court keeps in mind at the end of the day
20 is the substantiation of harm and the fact that we think there
21 hasn't been any showing of injury, let alone one caused by DACA
22 itself; but certainly that this case, I think, differs in kind
23 from the degree of harm that the states are trying to show,
24 both in the number of plaintiff states that are before
25 Your Honor but also in how many of them are trying to show harm

1 and the kind of harm they're trying to show.

2 So wherever this Court ultimately comes down on
3 the standing motion, we do believe the DACA intervenors' motion
4 should be granted. We think it also will bear on the remedy as
5 well.

11:07AM

6 THE COURT: Okay.

7 MR. FEIGENBAUM: Thank you, Your Honor.

8 THE COURT: Mr. Coghlan, anything from the federal
9 side?

11:07AM

10 MR. COGHLAN: Very briefly, Your Honor.

11 As I suggested before, the federal defendants'
12 view is that the issues on standing that are before the Court
13 now are essentially the same as they were when we were in the
14 preliminary injunction phase, which the Court already addressed
15 and the ruling noted that there need not be a substantial
16 demonstration of injury, only some injury.

11:07AM

17 So, you know, the federal defendants' view is
18 that the facts have not materially changed in a way that would
19 affect the Court's prior analysis and we recognize that.

11:07AM

20 THE COURT: Thank you.

21 All right. Mr. Disher, do you want to defend
22 yourself?

23 MR. DISHER: Thank you, Your Honor.

24 The defendant intervenors are essentially asking
25 this Court to judicially codify the one-way ratchet theory of

11:07AM

1 federal rights and benefits.

2 As the Court is well aware, states across the
3 country have sued repeatedly over attempted rescissions or
4 modifications to the DACA program. No Court in the country has
11:08AM 5 ever denied states standing to sue over the rescission or
6 modification of DACA and yet they ask this Court to find that
7 these plaintiff states here do not have standing to challenge
8 the creation of the program.

9 In other words, the determination or modification
11:08AM 10 of that program can be challenged; but the creation of it,
11 according to them, cannot be challenged by a state.

12 And I would simply posit that that is not what is
13 required here and the plaintiff states absolutely have standing
14 to challenge the very thing that created their injury and their
11:08AM 15 harm.

16 As to the *Regents* opinion, all of the arguments I
17 heard about the *Regents* opinion may apply or might apply if
18 standing, as this Court is aware, was an accounting exercise,
19 but it is not.

11:08AM 20 So all we have to do under binding Fifth Circuit
21 precedent is prove some scintilla of injury and we certainly
22 have done that, not only with our evidence but the evidence
23 that the defendant-intervenors have introduced themselves.

24 Of course, Your Honor will recall the
11:09AM 25 cost-benefit analysis from Dr. Perryman, who in doing that had

1 to find not only the benefits but the costs and he estimated
2 the costs to Texas alone providing social services to DACA
3 recipients was over \$250 million a year.

4 That cost-benefit analysis was used at the
11:09AM 5 preliminary injunction stage, and it continues to be used today
6 in the DACA intervenors' response to our motion for summary
7 judgment.

8 Regarding New Jersey's arguments, I would just
9 simply note that New Jersey in all of its written briefing in
11:09AM 10 the case has not challenged our standing to bring this claim.
11 They certainly challenge us on the merits, but they have not
12 ever alleged in their briefing that we lack standing because it
13 would be certainly an odd position for New Jersey to argue that
14 they have an interest in this case in order to intervene and
11:10AM 15 yet the plaintiff states don't have the sufficient interests to
16 support their standing to bring these claims in the first
17 place.

18 To this Court's point about the take care clause
19 claim, we agree with this Court that it proves the take care
11:10AM 20 clause claim, but it also proves the substantive and procedural
21 violations of DACA as well.

22 Yes, there are limited funds to remove certain
23 individuals; but what the federal government has done here is
24 say there is a class of individuals; we may or may not have
11:10AM 25 resources to remove them. But instead what we are going to do

1 is grant them lawful presence to remain.

2 And I heard the counsel for DACA intervenors say
3 DACA is not responsible for their presence. DACA, in fact, is
4 what grants them lawful presence; and so, of course, we have
5 standing to challenge that grant as being unlawful pursuant to
6 Congress's duly enacted statutes.

7 We as states do not have the power to enforce
8 immigration or remove anybody from our states so we have to
9 rely on the federal government to do that and the federal
10 government's actions are controlled by Congress and its duly
11 enacted immigration schemes.

12 And what the federal government or -- excuse me.
13 What the executive branch has done is basically rewrite those
14 congressional mandates and doing so does indeed support our
15 injury to bring this claim.

16 THE COURT: Thank you, Mr. Disher.

17 MR. HALLWARD-DRIEMEIER: May I respond?

18 THE COURT: You may.

19 MR. HALLWARD-DRIEMEIER: Thank you, Your Honor.

20 A few points. Let me start with the one-way
21 ratchet.

22 The states in the instance of challenging the
23 rescission of DACA were able to show the kind of very direct
24 particularized costs to the state that Texas showed in the DAPA
25 litigation but does not have here.

1 Specifically if the DACA recipients lose their
2 work authorizations and lose the health care that they have
3 privately as a consequence of their employment and then have to
4 rely instead on emergency, that would be an additional cost to
5 the State. That does not support the conclusion that Texas
6 would like the Court to draw because Texas's theory of --

7 THE COURT: You're assuming when you say that that they
8 all have health care.

9 MR. HALLWARD-DRIEMEIER: Well, Your Honor, what we are
10 talking about is the loss of work authorization.

11 THE COURT: I know, but if they're not working. DACA
12 doesn't require them to work.

13 MR. HALLWARD-DRIEMEIER: No, but they showed a specific
14 number of people who were working and as a consequence had
15 private insurance and would lose that insurance, that was a
16 direct injury that they were able to demonstrate.

17 THE COURT: Well, wouldn't the direct injury be if
18 they're not working? Wouldn't they have to cover those
19 people's health care?

20 MR. HALLWARD-DRIEMEIER: Again, this goes to the point
21 earlier, the difference between presence and lawful presence.

22 The health care costs of those who are not
23 working and relying on the emergency system is because those
24 individuals are present. It does not have to do with whether
25 they are or not lawfully present.

1 In fact, being lawfully present, to the extent
2 that it has a consequence, some are able to obtain work
3 authorizations and employment reduces --

4 THE COURT: But aren't you essentially saying that the
5 DACA recipients, if DACA goes away, are just going to violate
6 the law and stay? I mean, that's your argument.

7 MR. HALLWARD-DRIEMEIER: Your Honor, am I arguing that
8 they're going to stay? Yes.

9 THE COURT: Okay.

10 MR. HALLWARD-DRIEMEIER: The evidence is that they have
11 stayed. They have been here. In fact, they have to have been
12 here since 2007.

13 THE COURT: Right.

14 MR. HALLWARD-DRIEMEIER: They were here for years
15 before DACA existed; and as a consequence, it is a fair
16 conclusion that they will stay. And because they are present,
17 there may be costs associated with that, but they are not
18 attributable to DACA. In fact, they will increase if DACA is
19 rescinded. So the State is again -- the State is not
20 proclaiming to remedy and rectify costs. It's going to
21 self-impose additional costs.

22 Counsel for the government suggested that we're
23 here at the same as the PI. No. At the preliminary injunction
24 stage, the Court said that it was accepting the States'
25 allegations with respect to our motion to dismiss and also

1 noted that it was, quote, not deciding the motion on the
2 merits.

3 Now Texas is asking you to decide the question on
4 the merits, and it doesn't have the evidence to support it. It
11:15AM 5 suggests that -- Your Honor asked the question, I think, about
6 whether causation is sort of part of this jurisdictional
7 inquiry or part of the merits.

8 Here, the oddity of an APA claim is that
9 causation is not part of their ultimate merits claim. It is
11:15AM 10 part of the standing inquiry.

11 So that's the point at which we have to decide
12 that issue and they have to come forward at the motion for
13 summary judgment stage with evidence to support it.

14 They didn't do so; but at the very least, our
11:15AM 15 experts and declarants contest the evidence and would preclude
16 summary judgment.

17 And then finally on the take care claim, the take
18 care clause claim is not an APA claim; so to the extent that
19 the Court believes that the APA cause of action special
11:15AM 20 solicitude under *Massachusetts*, et cetera, is the hook for
21 standing, that would not cover the take care clause claim.

22 THE COURT: Wait. Why?

23 MR. HALLWARD-DRIEMEIER: Because it's not an APA claim.

24 THE COURT: No. I agree with that.

11:16AM 25 MR. HALLWARD-DRIEMEIER: So in *Massachusetts v. EPA*,

1 the Supreme Court -- and, again, what I think is sort of the
2 outer edge of this notion of special solicitude and --

3 THE COURT: You're singing my song.

4 MR. HALLWARD-DRIEMEIER: Well, Your Honor, for
5 11 years --

6 THE COURT: I wish there were more than just you.

7 MR. HALLWARD-DRIEMEIER: -- sang that song repeatedly.
8 I wish they were singing it still.

9 But the fact is that there the Court relied on
10 the fact that the Clean Air Act had specifically provided a
11 cause of action for the procedural harm.

12 THE COURT: Right.

13 MR. HALLWARD-DRIEMEIER: And to the extent that the
14 Court believes that the APA provides a claim of that nature
15 here, we don't think it does; but it certainly would not
16 support the take care clause claim which is a constitutional
17 claim which does not have to do with DACA. It has to do, as
18 Your Honor has said, with the fact that these individuals are
19 here and not being removed. So I think there's a disconnect.

20 THE COURT: Why don't they have -- let's say they can't
21 prove an APA standing. Don't they have take care standing?

22 MR. HALLWARD-DRIEMEIER: They would have to show
23 Article III standing to bring a take care clause claim --

24 THE COURT: Right.

25 MR. HALLWARD-DRIEMEIER: -- and they have not because

1 they don't have a direct injury and we've never seen the sort
2 of novel theories that they have about special solicitude or
3 *parens patriae*.

4 Of course, there's Supreme Court precedent that
11:17AM 5 says *parens patriae* is not a basis for bringing a suit against
6 the United States. Clearly -- it's certainly never been a
7 basis of a suit against the United States for a constitutional
8 claim.

9 THE COURT: Well, the interpretation of that by the
11:17AM 10 Supreme Court has basically been you can't sue the
11 United States for something they're doing, but you can sue them
12 to make them comply with their own law.

13 MR. HALLWARD-DRIEMEIER: Well, Your Honor, with respect
14 to a statutory -- specific statutory command. But the idea
11:18AM 15 that the take care clause has that kind of specificity to give
16 a cause of action -- I've never heard of the idea that that was
17 just a generalized cause of action that the State can bring
18 whenever it thought that the federal government wasn't doing
19 its job.

11:18AM 20 THE COURT: I mean, setting aside the Clean Air Act,
21 that's essentially what they did in *Massachusetts versus EPA*.

22 MR. HALLWARD-DRIEMEIER: But they did not rely on that.
23 They relied on a specific cause of action that Congress had
24 created based upon the procedural harm that was critical to the
11:18AM 25 Court's analysis there.

1 And if I haven't said it before, I do want to
2 stress Mr. Perryman's supplemental declaration which stress
3 that this 250 million figure that has been thrown around there
4 was something that was assumed for purposes of analysis that
11:19AM 5 showed that even if you assumed costs, the benefits were
6 greater. He specifically said he did not study to determine
7 whether there were any costs of DACA and that he was unaware of
8 any studies that had been done to do that.

9 And of course we know that when plaintiffs'
11:19AM 10 declarants were asked about this status claim, that they had
11 never done such a study either.

12 It is the burden of the plaintiffs as movants for
13 summary judgment to come forward with evidence to support their
14 theory of injury and they have not done so; but at the very
11:19AM 15 least, whatever evidence there is, it's contested and would
16 preclude summary judgment.

17 THE COURT: All right.

18 MR. DISHER: Your Honor, I forgot to make one point;
19 and I'll be real brief. I promise. And if he wants to
11:19AM 20 respond, I certainly won't object to that.

21 Just one brief point to make. I would just
22 simply point the Court back to Footnote 45 of your preliminary
23 injunction order talking about the redressability analysis to
24 vindicate a procedural right.

11:20AM 25 Of course, the Fifth Circuit in *Texas I* said

1 Texas had satisfied the third standing requirement,
2 redressability, in joining DAPA based on the procedural APA
3 claim could prompt DHS to reconsider the program which is all a
4 plaintiff must show when asserting a procedural right.

11:20AM 5 When Your Honor rules on our motion for
6 preliminary injunction, DHS was subject to no less than two
7 preliminary injunctions as well as a final order from the DC
8 Court. That is no longer the case today, especially since the
9 Court in the Eastern District of New York vacated the Wolf and
11:20AM 10 the Edlow memos.

11 As we have laid out, DACA is now back in full
12 effect as it was when it was first issued in 2012 via the memo;
13 therefore, the Fifth Circuit's statement here about addressing
14 its procedural APA claim absolutely applies to this case now
11:20AM 15 given the posture that it is in.

16 So I would direct the Court to Footnote 45 and
17 note that we are now in a different spot for the purposes of
18 that footnote than we are today.

19 MR. HALLWARD-DRIEMEIER: With respect, Your Honor, in
11:21AM 20 the *Texas I* case, the APA case, the redressability was that if
21 there was no work authorization, that lawful presence was
22 rescinded, then they would not be eligible for the driver's
23 license. That was a very direct, just setting it aside, we
24 eliminated that cost.

11:21AM 25 Here, in order to show redressability, they have

1 to go through the self-removal theory and that is where we
2 contest that they have provided any evidence, much less summary
3 judgment evidence.

4 With respect to the government's position,
11:21AM 5 Your Honor last time suggested it was not going to be swayed by
6 what is or is not going on in other courts which may or may not
7 be temporal, although the Wolf and Edlow memos have been set
8 aside, the government has indicated that it may appeal that
9 or -- and of course that would be one way to resolve it. The
11:22AM 10 other way would be simply to have somebody appointed with
11 authority to enter the same.

12 What's clear from *Regents* --

13 THE COURT: Okay. Somebody at DHS you're talking
14 about?

11:22AM 15 MR. HALLWARD-DRIEMEIER: Yes, somebody at DHS.

16 What's clear from *Regents* is that that is a call
17 for the United States to make and for DHS to make and that that
18 is a decision that must be made with an eye toward the reliance
19 interests as well as noting the difference between any benefits
11:22AM 20 that might flow from simple forbearance, which is the presence
21 as opposed to the lawful presence.

22 So *Regents* emphasizes that presence does not go
23 away even if DACA goes away. *Regents* also stresses that more
24 is within the discretion of DHS.

11:23AM 25 And I don't think that it's the proper response

1 to the Court's order in *Batalla Vidal* to direct the government
2 now to take some action when the government could simply cure
3 that problem by a proper appointment.

4 Thank you.

11:23AM 5 THE COURT: All right, Mr. Disher. Let's turn to the
6 merits. That would be your motion.

7 MR. DISHER: Thank you, Your Honor.

8 As this Court is aware, no president, Democrat or
9 Republican, can override Congress's duly enacted law and yet
11:23AM 10 that is exactly what the Obama administration did with the 2012
11 DACA memorandum.

12 What's worse, President Obama admitted as much
13 himself. Before his administration created DACA, he said,
14 quote, there are enough laws on the books by Congress that are
11:23AM 15 very clear in terms of how we have to enforce our immigration
16 system that for me to simply through executive order ignore
17 those congressional mandates, that would not conform with my
18 appropriate role as president.

19 His administration issued the 2012 DACA
11:24AM 20 memorandum anyway and after his administration issued that
21 memo, he again went on record to say, "I just took an action to
22 change the laws."

23 Of course, President Obama was not authorized to
24 take that action, as the Fifth Circuit ruled when it held that
11:24AM 25 DAPA and expanded DACA were unlawful. They were, quote, flatly

1 impermissible with the controlling statutory framework.

2 The Supreme Court in the *Regents* opinion has now
3 affirmed this core tenant of this Court's prior ruling that
4 DACA, quote, does not announce a passive nonenforcement policy.
11:24AM 5 It created a program for conferring affirmative immigration
6 relief. That comes from the majority opinion in the *Regents*
7 case.

8 Now, the context of that ruling is likewise
9 critical for this Court's analysis. The majority held that in
11:25AM 10 ruling that DACA and the rescission of DACA is a reviewable
11 action. That ruling is dispositive for both the substantive
12 and the procedural APA claims in front of this Court as well as
13 the take care clause claim.

14 THE COURT: Why is it dispositive of the substantive
11:25AM 15 claim?

16 MR. DISHER: Yes, Your Honor.

17 In so ruling, the Supreme Court has confirmed
18 that DACA is not a mere grant of removal forbearance. DACA
19 went further than that. DACA, as the Supreme Court has now
11:25AM 20 ruled, did not just forebear from removal. It granted
21 affirmative lawful presence and the associated benefits to a
22 class of 1.5 million people, both of which the lawful status,
23 the lawful presence -- excuse me -- lawful presence as well as
24 the associated benefits are contrary to Congress's immigration
11:25AM 25 scheme.

1 Congress has said that some populations must and
2 some populations may be granted deferred action. And neither
3 of those two populations are the eligible recipients for
4 deferred action through the DACA memorandum.

11:26AM 5 The Court could not -- excuse me. Congress could
6 not have left such extreme power to the executive branch when
7 it has enacted and continues to refine and update its
8 congressional immigration scheme.

9 And, Your Honor, still to this day nobody in
11:26AM 10 front of Your Honor can come up with an answer to the most
11 basic question which is what is the limiting principle?

12 If the executive could grant lawful status --
13 excuse me -- lawful presence and the associated benefits to
14 these 1.5 million people, why can it not do the same for every
11:26AM 15 unlawfully present person in the United States? That is not
16 within the executive's power and so, therefore, this grant of
17 deferred action surely must fail.

18 And that's to not even mention the use of advance
19 parole which DACA makes its recipients eligible for.

11:27AM 20 As we know now in discovery in this case, the
21 federal defendants estimate that 14,000 DACA recipients have
22 used DACA to adjust their status who otherwise could not have.

23 THE COURT: Where is that in the record?

24 MR. DISHER: Yes, Your Honor. I believe it's Exhibit 3
11:27AM 25 to our motion. Let me just pull it up so I make sure. It's

1 actually Exhibit 2, which is at ECF 487-2. It is a response
2 from the federal government to the DACA intervenors'
3 interrogatory.

4 They did the statistical sample that we had a
11:27AM 5 hearing about in the past and based on that statistical sample
6 of 500 individuals, they found that 484 of those individuals
7 could not have adjusted their status but for using advance
8 parole, which is made available to them only through the DACA
9 program. Extrapolating that percentage out to the entire
11:28AM 10 population that has received DACA and adjusted their status
11 later, the federal government estimates that with a plus-minus
12 1.5 percent margin of error, between 13,908 and 14,358
13 requesters did this.

14 In other words, they were not eligible to adjust
11:28AM 15 their status, they got advance parole through DACA, and they
16 have since adjusted their status. And of course as the Court
17 knows, adjusting their status is a step on the pathway to
18 citizenship.

19 So despite the assurances from the Obama
11:28AM 20 administration that DACA did not confer a pathway to
21 citizenship, we know that the evidence proves otherwise. The
22 evidence shows that over 14,000 DACA recipients have now
23 adjusted their status who could not have without the DACA
24 program. That is why DACA is a substantive violation of
11:29AM 25 Congress's duly enacted laws.

1 As to the procedural aspect and why the *Regents*
2 opinion confirms our claims here, in his opinion Justice Thomas
3 says that DACA fundamentally altered immigration laws.

4 Quote, DACA is thus what is commonly called a
5 substantive or legislative rule.

6 And of course those type of rules are subject to
7 notice and comment rulemaking under the APA. Now, that was
8 Justice Thomas, joined by Justice Alito and Justice Gorsuch.
9 But Justice Thomas recognizes what we must. The majority --
10 and, again, this is a quote from Justice Thomas's opinion.

11 "The majority tacitly acknowledges as much" --
12 again, that DACA is a substantive or legislative rule that
13 required notice and comment rulemaking -- "as it must.
14 Otherwise, the majority would have to accept that DACA was
15 nothing more than a policy of prosecutorial discretion which
16 would make its rescission unreviewable."

17 The Court did not find that. The Court found
18 that DACA is reviewable; therefore, extending that logic out,
19 it was a substantive or legislative rule that required notice
20 and comment rulemaking subject to the APA and, of course, the
21 2012 memo that instituted DACA did not go through that.

22 Likewise, Your Honor, the defendant-intervenors'
23 pleadings in this case make that -- say that very point. Their
24 arguments are replete with the benefits that they have received
25 from DACA. Those benefits are what make DACA a substantive or

1 legislative rule.

2 And they also on the flip side argue what they
3 stand to lose should the program be set aside. If DACA was
4 nothing more than some guidance, then they would have no
5 argument about what they're going to lose should DACA be set
6 aside.

7 And, again, Your Honor, their own experts have
8 admitted this point. The defendant-intervenors have designated
9 an expert in immigration named Shoba Wadhia. Professor Wadhia
10 is a professor at Penn State University Law School. She
11 authored a report concerning, quote, the history and use of
12 prosecutorial discretion, including specifically deferred
13 action.

14 Professor Wadhia also wrote a book called
15 *Beyond Deportation* and in it she acknowledges what we've been
16 saying all along. Deferred action, quote, may officially walk
17 like a discretionary act; but to individuals who are granted
18 this remedy, it quacks like a substantive benefit. That's on
19 Page 87 of her book and that just confirms again what we've
20 been saying all along and she comes to the same conclusion
21 which we have been alleging since the beginning of this case.

22 This is on Page 152. Quote, DHS must publish
23 deferred action as a regulation in the *Federal Register*.

24 Skipping two sentences: Deferred action is the
25 kind of program that should be subject to notice and comment

1 rulemaking under the Administrative Procedure Act.

2 That is what we have been saying since we filed
3 this lawsuit in May of 2018, and their own expert agrees with
4 us. That is why this Court must set aside the DACA program as
11:32AM 5 not only a substantive violation of the APA, a violation of the
6 executive's responsibility to take care that the laws are
7 faithfully executed, but for the very common sense
8 prosecution -- position that a program of this magnitude must
9 at least go through notice and comment rulemaking pursuant to
11:32AM 10 the APA.

11 Now, Your Honor, one additional thing I will
12 mention to Your Honor is that never before have we been in
13 front of this Court with DACA being in full force and effect.
14 It is now.

11:33AM 15 Based on the ruling out of the Eastern District
16 of New York, for the first time since we have filed this
17 lawsuit, the federal defendants are now accepting new
18 applications of DACA as well as processing advance parole for
19 DACA recipients which again can lead to that pathway to
11:33AM 20 citizenship.

21 But the legal analysis from the preliminary
22 injunction posture to today remains as true as ever. DACA is
23 unlawful and therefore under the APA, it must be set aside.

24 There has been some mention about remanding the
11:33AM 25 decision to the agency to reconsider it or to provide more

1 explanation. Your Honor, there's nothing else for the agency
2 to explain. DACA is unlawful.

3 THE COURT: I wonder if I -- well, I'll take up
4 remedies later on.

11:34AM

5 MR. DISHER: Okay. They simply -- as a matter of law,
6 they cannot do what they did. Therefore, the remedy here is
7 simple. The Court must set aside DACA pursuant to the terms of
8 the APA and there is nothing for the agency to do at this point
9 related to the program that it instituted with the 2012 memo.

11:34AM

10 Therefore it is up to this Court, in reviewing that agency
11 action under the terms of the APA, to set aside that program.

12 THE COURT: Okay. Thank you, Mr. Disher.

13 Ms. Perales, you want to take the ball on this?

14 MS. PERALES: Thank you, Your Honor.

11:34AM

15 THE COURT: Uh-oh. She took off her mask. You're in
16 for it now.

17 MS. PERALES: I promise I won't pick up my binder and
18 drop it though.

11:34AM

19 Since 2018, the plaintiffs have pushed for a
20 merits ruling and they've done so at every turn. But at the
21 center of this case the facts are missing that the plaintiffs
22 need to prevail.

11:35AM

23 This case is like a doughnut. It has a lot of
24 thick legal argument around the outside but the center is
25 empty. Plaintiffs have again invited this Court now to reach

1 the merits of DACA; but on this summary judgment record, the
2 Court need not and should not accept that invitation.

3 I would like to start with some disputed facts,
4 the first one related to discretion and then move to additional
11:35AM 5 material facts that are in genuine dispute.

6 THE COURT: Before we even get to discretion, because I
7 don't know that my -- I want you to talk about it but let me
8 ask you -- I mean, this is the elephant in the room question.

9 Didn't *Regents* hold that APA applies to DACA? I
11:35AM 10 mean, the majority opinion says it applies to DACA. Six judges
11 agreed with that. And the dissent said it applied to DACA and
12 we ought to hold it illegal now.

13 So I have all nine judges of the Supreme Court
14 saying that APA applies to DACA, don't I?

11:36AM 15 MS. PERALES: The majority found that the rescission
16 was reviewable under the APA.

17 THE COURT: And that the President or Secretary of
18 Homeland Security, whomever did the withdrawal, didn't comply
19 with the APA; but it went further than that. It described, you
11:36AM 20 know, the opinion as, you know, being a lot more than
21 prosecutorial discretion. It said it was an award of benefits.

22 MS. PERALES: Our reading of the *Regents* decision,
23 Your Honor, is actually helpful to our position which is that
24 the Court made clear that DACA is an exercise of prosecutorial
11:37AM 25 discretion to defer removal of a particular individual.

1 THE COURT: Okay.

2 MS. PERALES: Which is consistent with our position.

3 THE COURT: And with an award of benefits because
4 that's what they reversed the Trump administration on by saying
5 that they didn't consider the benefits.

11:37AM

6 MS. PERALES: Well, *Regents* pointedly and very clearly
7 states that a couple of the things that are at issue that are
8 referred to as benefits, and that's primarily work
9 authorizations, flows from other regulations.

11:37AM

10 So in our reading of *Regents*, there's this really
11 strong separation between the decision to defer removal and the
12 preexisting, long-existing regulations on work authorizations.

13 THE COURT: Well, first of all, I mean, in *Texas I*, the
14 Fifth Circuit didn't buy that argument; but more importantly,
15 and I'm looking at the employment authorization in the record,
16 and it says: "Since approval of the form I-821D" -- and that's
17 the DACA form -- "is a prerequisite and since the EAD" -- which
18 is Employment Authorization document "is based upon a grant of
19 DACA." That's what it says.

11:38AM

20 MS. PERALES: Yes, Your Honor. But the work
21 authorization regulations that have existed for many, many
22 years before DACA provide that an individual with deferred
23 action -- not DACA, but deferred action because all of this
24 came along before DACA.

11:38AM

25 THE COURT: Right.

11:38AM

1 MS. PERALES: An individual with deferred action may be
2 able to secure work authorization. So this benefit, as it's
3 termed, of work authorization is distinct from what the Court
4 in *Regents* identified as the centerpiece of DACA, which is
5 deferred action or deferred removal.

11:39AM

6 THE COURT: Okay. I agree with that.

7 MS. PERALES: And the plaintiffs have had abundant
8 amount of time to challenge work authorization regulations and
9 they have chosen not to. So that piece is not at issue here.

11:39AM

10 When you receive DACA and you have deferred
11 action, you have benefitted from an exercise of discretion that
12 is favorable to you. The government has said, "We know that
13 you're here. We have decided not to move to remove you at this
14 time."

11:39AM

15 That deferred action then, under these long
16 preexisting regulations, allows you to apply for work
17 authorization and further requires you to demonstrate financial
18 need; but that was never challenged in this case.

11:40AM

19 So this is part of one of the facts actually,
20 Your Honor, that I was going to touch on which is that this
21 idea of DACA bestowing eligibility for various types of
22 benefits -- whether they're federal, whether they're state or
23 local -- is to some extent part of plaintiffs' legal argument
24 but it's really a fact about what DACA is. DACA itself does
25 not give work authorization. It's the preexisting regulations

11:40AM

1 that are not challenged here that allow somebody to apply.

2 THE COURT: But I mean that argument was rejected by
3 the Fifth Circuit in *Texas I*. Am I not bound by the
4 Fifth Circuit?

11:40AM

5 MS. PERALES: *Regents* explains that the Fifth Circuit
6 found that the benefits of work authorization and other things
7 were problematic or inconsistent with the INA, but did not
8 touch and did not talk about the core of deferred action --

9 THE COURT: I'm sorry. I didn't hear that.

11:41AM

10 MS. PERALES: I'm sorry. The *Regents* Court explained
11 that the Fifth Circuit focused on work authorization and other
12 so-called benefits, but that the Fifth Circuit analysis did not
13 touch what is at the core of DACA, which is the decision to
14 defer action or defer removal proceedings against an
15 individual. That's what the *Regents* Court has told us about
16 the import or the weight of the Fifth Circuit decision.

11:41AM

17 THE COURT: Well, that's because I didn't in *Texas I*
18 say that anyone had to be removed or that the government
19 couldn't practice prosecutorial discretion.

11:42AM

20 MS. PERALES: Your Honor said it and then the
21 Fifth Circuit said it and then the Court in *Regents* explains to
22 us that to the extent that this Court is bound by DAPA or
23 *Texas I*, there is a separation between the consideration of
24 these benefits and the consideration of deferred action at its
25 core which is a deferred action. It's hard to paraphrase it.

11:42AM

1 THE COURT: I was trying to do this same -- but I cut
2 Mr. Disher off a minute ago, but let's go ahead and plunge into
3 it then because your argument brings this up.

4 Let's say hypothetically the Court finds they
5 have standing, the states have standing and that it violates
6 the APA because there was no notice of comment. Y'all have to
7 concede there was no notice of comment.

8 MS. PERALES: There was no notice of comment,
9 Your Honor.

10 THE COURT: All right. Is there a difference -- and
11 I'm going to use this term not in its technical sense but in a
12 general sense so you understand what I'm saying -- I mean, the
13 severability sense because I read *Regents* as kind of saying
14 that, that the discretion that leads the DACA recipients here
15 but may severable from the benefits.

16 Is that what you're saying?

17 MS. PERALES: We're not arguing severability,
18 Your Honor.

19 THE COURT: I know, but I didn't mean that in the
20 technical sense.

21 MS. PERALES: But I understand the question. And I
22 think it would be best -- most accurate to say that our
23 position is that to the extent that the plaintiffs challenge
24 the benefits, they didn't sue against the things that they're
25 really complaining about, which is they did not sue to

1 invalidate the work authorization regulation which is
2 (c)(14) -- 247(c)(14). They did not sue to invalidate that.
3 If that's the issue -- that is, the benefit of work
4 authorization -- and then once you pay into the system, you may
5 be able to --

11:44AM

6 THE COURT: Well, but if they knock out DACA, they
7 knock out the right for these a million five people to work.

8 MS. PERALES: If they didn't have DACA, they would not
9 have work authorization. That's right.

10 THE COURT: Right.

11 MS. PERALES: But work authorization flows from
12 separate and free-standing regulations that plaintiffs did not
13 challenge; so to the extent that plaintiffs -- I apologize to
14 the court reporter -- to the extent that plaintiffs are
15 challenging the work authorization benefit, they should have
16 sued to invalidate the Regulation 247(c)(14). They did not.

11:44AM

17 Same thing with advance parole. Advance parole
18 is statutory. It is for any undocumented individual.

19 So first of all, as a fact statement, DACA does
20 not confer eligibility for advance parole. The statute is
21 clear. It's 1152 -- I can get it for Your Honor. 1152 -- I
22 think it's -- I will find it for Your Honor -- on advance
23 parole.

11:45AM

24 It says: Any individual -- I'm sorry.

25 8 USC 1182(d)(5)(A) says any undocumented person can apply for

11:45AM

1 advance parole; so, again, it's a fact issue. DACA does not
2 provide eligibility for advance parole.

3 THE COURT: Doesn't it apply eligibility for people who
4 have entered the country illegally?

11:45AM

5 MS. PERALES: Say that again, Your Honor.

6 THE COURT: As opposed to people who have overstayed
7 their visa, doesn't DACA allow for advance parole for those who
8 have entered the country illegally?

11:46AM

9 MS. PERALES: DACA doesn't say anything about advance
10 parole. The advance parole statute is open to any individual.

11 THE COURT: So if I come in the country illegally and I
12 leave, I can come back in? I don't have to wait ten years?

11:46AM

13 MS. PERALES: If you entered without inspection,
14 Your Honor, and you were here out of status and you sought an
15 advance parole document as you are entitled to do under the
16 statute and you were granted it --

17 THE COURT: Yeah; but if I am in the country illegally,
18 am I going to get that granted?

11:46AM

19 MS. PERALES: Yes, you can. The statute is plain on
20 its face that any individual can apply and receive an advance
21 parole document. DACA doesn't say anything about advance
22 parole. The advance parole statute doesn't say anything about
23 DACA.

11:47AM

24 THE COURT: But all their -- I don't know what you call
25 them -- handbooks, worksheets, all the evidence says DACA

1 people get advance parole.

2 MS. PERALES: Anybody can get advance parole. DACA are
3 a subset of all people and anybody -- it is the case that
4 people apply for and receive advance parole routinely from the
5 United States government and plaintiffs haven't shown
6 otherwise.

7 They did talk about 484 DACA recipients who
8 adjusted status. That is .69 percent of all DACA recipients as
9 estimated by the federal government. This is not some wide
10 open door, this is not some component of DACA if only .69 of a
11 percent of DACA recipients are projected to have been able to
12 use it.

13 THE COURT: And, Ms. Perales, Mr. Disher used the
14 figure of 1.5 million people. Is that the figure you're kind
15 of working off of as well?

16 MS. PERALES: No, Your Honor. I brought because I was
17 moved by Your Honor's footnote in the preliminary injunction
18 opinion about --

19 THE COURT: I shouldn't put so many footnotes. I get
20 them quoted back to me by both sides. I'm going to quit
21 writing footnotes.

22 MS. PERALES: I have shared this with counsel. I'm
23 just going to read it --

24 THE COURT: Just give it to Charlotte.

25 MS. PERALES: There you go.

1 These are the current numbers on the number of
2 individuals who are currently recipients of deferred action
3 under DACA. It's about 645,000.

4 Your Honor pointed out that there were various
11:48AM 5 numbers at the time and of course the expert reports are always
6 going to be snapshots of whenever they were written. But
7 that's the number that we're talking about right now is
8 645,000.

9 THE COURT: And how many -- do we know how many people
11:49AM 10 got DACA status but let it expire?

11 MS. PERALES: We know that at the high point there were
12 821,000 people who all had DACA at the same time, but I don't
13 know and now of course we're down significantly, about
14 180,000 --

11:49AM 15 THE COURT: Do we know how many -- what the potential
16 DACA population is? Now, that number should be dwindling, I
17 would think; but that's eligible for DACA but have not applied?

18 MS. PERALES: I do not know of that number, Your Honor.
19 I don't think that number is in the record.

11:49AM 20 THE COURT: Okay. Because I think that's what
21 Mr. Disher's 1.5 included, people that had it, have it, or
22 could have it.

23 MS. PERALES: At a certain point in time --
24 Mr. Disher's estimate may have been drawn from a certain point
11:49AM 25 in time. As Your Honor has noted, there are people who are

1 aging out --

2 THE COURT: It's a moving target.

3 MS. PERALES: There are people aging out at the top and
4 there's a point -- it's a fixed number. It's a fixed number of
5 people who can be eligible.

11:50AM

6 And so, Your Honor, what DACA is is actually a
7 disputed fact in this case. We assert that DACA is the
8 decision to defer removal proceedings against an individual.
9 It is discretionary. It is prosecutorial discretion. It is
10 one by one after an evaluation of each individual person's DACA
11 application.

11:50AM

12 The things of which plaintiffs complain, the
13 hooks on which plaintiffs hang their hats spring from other
14 sources of either regulation or statute, the advance parole
15 statute and the work authorization regulations.

11:50AM

16 So, Your Honor -- this is a very long way of
17 answering Your Honor's question. There are different pieces of
18 this picture and according to *Regents* almost the entire
19 decision of the majority in *Regents* is about these
20 distinctions.

11:51AM

21 And so it is our contention that under *Regents*,
22 there are these two components. The plaintiffs don't challenge
23 the prosecutorial discretion, the decision not to move against
24 somebody individually for removal proceedings. What the
25 plaintiffs do challenge is given to us by statutes and

11:51AM

1 regulations that are not at issue here and so it's not
2 appropriate to grant summary judgment to them.

3 THE COURT: You don't think they're challenging the
4 whole ball of wax?

11:51AM 5 MS. PERALES: I don't think there is a ball of wax,
6 Your Honor.

7 THE COURT: Okay.

8 MS. PERALES: There are no balls of wax, but there are
9 separate components of what is referred to as DACA. One of
11:51AM 10 them is forbearance. Another one is, according to the
11 plaintiffs, work authorization and advance parole. Those
12 things come from elsewhere and they should be challenged in
13 their own lawsuits.

14 The plaintiffs are perfectly able to sue to
11:52AM 15 overturn the work regulations for deferred action recipients,
16 claiming it's outside the statutory authority. They're also
17 perfectly capable of suing for the grants of advance parole to
18 DACA recipients as opposed to any other person who is here
19 unlawfully. That's what the advance parole statute is all
11:52AM 20 about. If they want to sue about that, they can.

21 What they did sue over though is DACA and DACA is
22 prosecutorial discretion and they already said in their
23 findings that they're not challenging that.

24 And so I think that's really what I mean by the
11:52AM 25 doughnut here is that there's really nothing when you get

1 really close in.

2 I did want to say and this -- we point this out
3 in our papers; but the legal argument about forbearance, just
4 focusing on forbearance. It's our position that their legal
11:53AM 5 argument is flawed because it collapses immigration status
6 which the INA is very careful to set out.

7 THE COURT: What do you mean by "collapses"?

8 MS. PERALES: It collapses two things. On the one
9 hand, immigration status which is provided for in the INA; and
11:53AM 10 on the other hand, the conditions that an individual finds
11 themselves in when they have deferred action.

12 Now, a deferred action recipient is still
13 undocumented. Deferred action is revocable at any time, not
14 just by --

11:53AM 15 THE COURT: Apparently not. If you're President Trump,
16 I don't think he would agree with you.

17 MS. PERALES: Yes. Well, rescission -- the dispute
18 there, rescission is a little bit different from revocability
19 with respect to the individual.

11:53AM 20 I asked my husband this morning over breakfast
21 whether the Court would recognize the term NTA and my husband
22 responded, of course he would.

23 And I wanted to point out that the issuance of an
24 NTA by a border person, by a border official, either in the
11:54AM 25 area or at the checkpoint, automatically revokes DACA and there

1 are no procedural rights to contest them.

2 So DACA is not immigration status. It has been
3 referred to as lawful presence, but lawful presence is not a
4 term you will find in the INA. You can search for the term
11:54AM 5 "lawful presence," and it's not there.

6 It's a phrase that we use to describe a person
7 that the government has taken note of and decided not to place
8 into removal proceedings at that moment.

9 And so lawful presence is not immigration status;
11:54AM 10 and for this reason, the exercise of discretion not to move
11 against somebody in terms of removal is not the same thing as
12 granting that person immigration status in a way that would be
13 contrary to the INA.

14 So as to the substantive claim here, we would
11:55AM 15 want to point out to the Court that there is a very strong
16 distinction between what DACA recipients have in deferred
17 action and what the INA talks about which is who has status,
18 who can come, and who is removable. Persons with deferred
19 action always remain removable. It is not inconsistent with
11:55AM 20 the INA.

21 The last point that I would like to make is that
22 when you remove all of these things, what's really left is a
23 complaint by plaintiffs about the number of people who have
24 received deferred action under DACA.

11:55AM 25 And this Court has expressed that concern as

1 well. The Court in its preliminary injunction opinion said it
2 remains outside the authority of the agency to defer action for
3 this many people.

4 And you know, my friend, Mr. Disher, has talked
11:56AM 5 about, well, there's no sort of cap on the number; but I would
6 like to focus on the bottom of that number for a minute.

7 If individual grants of DACA are lawful as an
8 exercise of prosecutorial discretion, DACA cannot be outside
9 the scope of executive authority. And this is true as we move
11:56AM 10 through the numbers.

11 THE COURT: So that the federal government -- or not
12 the federal government -- the executive branch can just grant
13 deferred action to every illegal alien in the United States?

14 MS. PERALES: Absolutely not.

11:56AM 15 THE COURT: That's what you just said. You just do it
16 one by one by one by one by one and pretty soon, you know --
17 again, we can argue over how many illegal aliens there are in
18 the United States, somewhere between 13 and 20 million.

19 MS. PERALES: The answer is that they cannot,
11:56AM 20 Your Honor.

21 THE COURT: Okay. What's to stop that? That was the
22 question I asked in the prior case and no one could give me an
23 answer to. The Fifth Circuit asked that question. Justice
24 Roberts asked that question and the solicitor general couldn't
11:57AM 25 give him an answer. Basically the answer they gave to the

1 Supreme Court was, well, we would never do that.

2 MS. PERALES: So the answer is no, because deferred
3 action, and particularly as guided by the DACA memorandum, only
4 applies to a limited number of people -- that finite group that
11:57AM 5 we were talking about plus all of the discretionary
6 considerations that go through those 150 pages of standard
7 operating procedure --

8 THE COURT: No. But what's to keep them from saying,
9 okay, now we're just going to adjust the criteria and we're
11:57AM 10 going to move it from June 15, 2012, to June 15, 2021 --

11 MS. PERALES: Well, but that's --

12 THE COURT: -- and everybody that now complies who
13 changes the date gets deferred adjudication? I'm sorry.
14 Deferred action. I switched gears on you.

11:58AM 15 MS. PERALES: Those days are behind me, Your Honor.

16 THE COURT: Yes.

17 MS. PERALES: I would say that that is not 2012 DACA.
18 If the question is is 2012 DACA substantively lawful, the
19 answer is yes and the answer is that it cannot apply to an
11:58AM 20 infinite number of people, it's very discretionary and that
21 only people who fulfilled the criteria are ever going to
22 receive that favorable consideration. There is no infinite
23 number on the top.

24 But I would like to focus on the bottom because I
11:58AM 25 think it also helps illuminate the issue before the Court. You

1 know, if the question is whether DACA is legal as to the people
2 who have received it, right, the answer is yes and plaintiffs
3 have not shown otherwise.

4 The plaintiffs do not say that Karla Perez, who
11:58AM 5 grew up in Pasadena, graduated from the University of Houston
6 School of Law, who now represents immigrant women who are
7 victims of violence in her work at a nonprofit, should not have
8 received DACA.

9 They don't say that Esther Jeon, who is with us
11:59AM 10 today, who also grew up in Houston and went to Harvard, where
11 she graduated in 2019, should not have received deferred action
12 after she underwent a careful and individualized review by the
13 agency.

14 Or -- and this is my last example -- Maria Diaz,
11:59AM 15 who is a nurse in Mission, Texas, who is working on the front
16 line of the COVID pandemic in the Valley, where it's
17 particularly severe as the Court knows.

18 The plaintiffs cannot identify any example where
19 anybody who has received deferred action shouldn't have and
11:59AM 20 this does go to the substantive lawfulness. We want to urge
21 the Court not to just look at some hypothetical infinite
22 number, but also to look at the individualized decisions that
23 plaintiffs do not challenge as part of what makes DACA lawful.

24 Thank you.

12:00PM 25 THE COURT: Thank you, Ms. Perales.

1 New Jersey, do you want to weigh in?

2 MR. FEIGENBAUM: Yes. Thank you, Your Honor.

3 There's three topics that New Jersey would like
4 to cover today; and as I understand it, we're saving remedies
12:00PM 5 for later so I will just focus on the first two, which is the
6 timing of the summary judgment motion and then the merits of
7 the motion itself.

8 So obviously plaintiff states are pursuing a
9 motion for summary judgment and they've framed it as what I
12:00PM 10 think would be termed a straightforward challenge to a 2012
11 DACA memorandum.

12 But in our view, the reality right now is much
13 more complicated. In our brief, we discussed the federal
14 government's choice to supersede this memo with the Wolf and
12:00PM 15 Edlow memos and our views on the choice that had on the case.
16 But admittedly since that time, the case has remained something
17 of a moving target.

18 For one, the *Regents* EDNY order had led to
19 significant uncertainty over what framework exactly federal
12:01PM 20 defendants are implementing; and I know you'll hear from them
21 in a moment.

22 Given as well I think the ongoing federal
23 transition, this Court can expect further changes to that
24 framework soon. So as a result, we think the easiest approach
12:01PM 25 for this Court to take is not the mootness finding that we

1 focused on primarily in our briefs but to follow the steps that
2 federal courts typically and often take during federal
3 transitions which is briefly pause the case and seek a status
4 update as soon as the transition has been completed.

12:01PM 5 That's what this Court did with the DAPA
6 litigation in *Texas I* and that's also what the Courts have
7 repeatedly done in previous transitions.

8 And I want to give four reasons why I think the
9 disposition of this case in particular would materially benefit
12:01PM 10 from an opportunity to hear from federal defendants after the
11 inauguration.

12 First, it will allow federal defendants to
13 eliminate the current confusion over the precise policy or
14 framework that is being implemented.

12:01PM 15 Second, it will ensure the best possible record
16 for this Court to make fact-bound assessments over issues like
17 DHS officer discretion.

18 Third, it will eliminate any of the outstanding
19 issues regarding lack of adversity or even any questions
12:02PM 20 regarding lack of adversity.

21 And fourth, it will allow for the orderly process
22 that *Regents* envisioned.

23 Of course, if this Court disagrees and reaches
24 the merits of plaintiffs' motion, then New Jersey, like the
12:02PM 25 DACA intervenors, believes that plaintiffs are not entitled to

1 summary judgment given the facts disputes that remain.

2 And then of course we will save for later our
3 perspective on what remedies would be appropriate if the Court
4 disagrees with all of that.

12:02PM

5 I thought I might begin with our discussion about
6 why it makes no sense not even to do a formal stay order or
7 formal pause on the case but simply, as is often the case in
8 summary judgment, not to actually issue any final ruling until
9 after the transition is complete so that federal defendants
10 could weigh in with a status update this Court would order
11 almost immediately a week or two after the transition is
12 completed.

12:02PM

13 The first is that as a general matter this is a
14 perfectly normal course for ways that federal courts handle
15 cases where policies can be a bit of a moving target during
16 transition and I think it's fair to say given the changes that
17 have happened since even we briefed this case, this case has
18 certainly been a moving target.

12:03PM

19 This Court took a similar action, as I noted, in
20 the DAPA litigation in *Texas I*, where the parties moved to have
21 this Court essentially stay proceedings from November of 2015
22 to February of 2017 to allow a change in administration to come
23 in and perhaps take a different approach and weigh in
24 differently on the lawfulness of the framework before the
25 Court. And as the Court is well aware, that's exactly what

12:03PM

12:03PM

1 ultimately happened in the DAPA litigation.

2 But I think there's another case from the
3 Southern District that I think is particularly illustrative
4 here and that's the *Veasey versus Abbott* case. That's
5 Docket 2:13-193.

12:03PM

6 That's a case that had been essentially ongoing
7 for three and a half years by the time the transition took
8 place and was in posttrial briefing and nevertheless the Court,
9 in an opinion by one of your colleagues for the

12:04PM

10 Southern District, nevertheless gave a continuance in 2017 to
11 allow for the transition from one leadership of the Department
12 of Justice to another DOJ leadership specifically on the basis
13 that they may change the position the federal government was
14 going to take. That was the federal government challenging the
15 Texas voter ID law. And as part of that challenge, that would
16 help illuminate the issues, even at post-trial briefing, in
17 front of the Court.

12:04PM

18 The private plaintiffs in that case actually
19 opposed but the Court nevertheless allowed a stay on that
20 posture and as a result, it did materially change the issues
21 before this Court.

12:04PM

22 This is not something unusual to this district by
23 any means. Plenty of circuit courts, including the DC Circuit
24 in lots of environmental cases where changes in administration
25 will change the legal and factual issues presented to the

12:04PM

1 Court, they repeatedly have granted stays from the
2 President Bush EPA to the President Obama EPA, from the Obama
3 EPA to the Trump EPA. And we have plenty of examples.

4 THE COURT: Let me ask you a question though. How can
5 they change what happened eight years ago?

6 MR. FEIGENBAUM: So I think because this case always
7 arrives on a posture of seeking injunctive relief rather than
8 damages, what really always matters to this Court is what sort
9 of remedy it's going to think about prospectively and whether
10 there are any violations in the implementation.

11 I think this Court's PI opinion was incredibly
12 helpful in illuminating that you don't just look at the words
13 on the page, but you also look at the implementation of the
14 frameworks on the ground.

15 And so how something might have been implemented
16 in 2013 says far less about the injunctive requests that are
17 pending before this Court than how it's being implemented in
18 2019 or 2020.

19 And I think that segues nicely into the four
20 reasons we have why this Court in particular would benefit from
21 following that normal course during the federal transition,
22 because, again, we think it isn't just about the 2012 memo.

23 The first reason that I gave is that we think
24 we're in a period of some confusion right now or moving target,
25 whichever phrase this Court or any of the parties want to use.

1 And we think that in particular there's some question about how
2 exactly the federal government wishes to implement DACA.

3 We spoke a lot about the Wolf and Edlow memos
4 which we believed addressed, in large part if not entirely, the
5 concerns about advance parole, the concerns about the lack of
6 use of discretion on the ground, and other concerns about the
7 types of various benefits that they went into some detail on
8 about in both the Wolf and Edlow memos.

9 Now, plaintiff states to Your Honor this morning
10 specifically said, "Well, now, because the Wolf and Edlow memos
11 are set aside, this is the first time in the history of the
12 case where the federal defendants are actually implementing
13 DACA fully against us," which I think is a sort of notable
14 comment.

15 And we actually don't think that's true because
16 there's a lot of opening questions we still have about how
17 federal defendants are implementing DACA and will be
18 implementing DACA in light of the *Batalla Vidal* order out of
19 EDNY.

20 Among other things, there's questions about
21 whether the federal defendants will appeal and there's
22 questions about whether the federal defendants are going to
23 repromulgate a new version, a similar version of the Wolf memo
24 by someone with due acting authority.

25 But even if they don't take those steps, there's

1 questions about how the *Batalla Vidal* order would be
2 implemented on the ground, even in the short-lived period until
3 a change in administration when issues around the authority for
4 this particular acting secretary all will by definition go
5 away. So whatever we think of that order, it's clearly
6 short-lived in its context.

7 Among other things, we know that after *Regents*,
8 the federal defendants nevertheless held initial applications
9 and did not grant advance parole to DACA recipients and so it
10 is quite possible that applications are being accepted but not
11 finally adjudicated right now.

12 When it comes to initial DACA requests, it's
13 quite possible that advance parole is still not being granted
14 because, again, it is separate from the 2012 DACA memorandum
15 itself and applies to anyone who wishes to seek it even if in
16 this country. Again, with nothing from the 2012 memorandum to
17 support their request.

18 So ultimately we have some serious questions that
19 hopefully federal defendants will be able to clear up for
20 Your Honor about how precisely the *Batalla Vidal* order and the
21 Wolf and Edlow memos all intersect and how they're being
22 implemented on the ground. But the point is that all of that
23 confusion goes away in just a month.

24 It also helps that we will have federal
25 defendants that are going to be defending DACA in whatever

1 precise memo the federal defendants have for implementing DACA.

2 If that's the case, then any of the outstanding
3 questions that ever existed in this case around lack of
4 adversity also will necessarily go away.

12:08PM

5 And I know that at the PI stage of this case,
6 Your Honor made a number of findings regarding adversity, and I
7 just have two responses to that.

12:09PM

8 The first, and I'll get to this in just one
9 moment, is that the lived experience of this case, including
10 now at the summary judgment posture, I think help illuminate
11 the problems that this case has had and that this record has
12 had and that any decision will have with the way federal
13 defendants have been defending this case.

14 THE COURT: Wait, wait, wait. Explain that.

12:09PM

15 MR. FEIGENBAUM: Of course. So we think that having --
16 the difference between, I think, willing warriors among federal
17 defendants and reluctant warriors is significant. Your Honor,
18 I think, rightly noted that DACA intervenors in New Jersey have
19 come in to vigorously defend DACA; and we're happy to be here
20 doing it.

12:09PM

21 But there are certain things we simply cannot do
22 that federal defendants are best able to do which is
23 effectively present to this Court sufficient -- the complete
24 picture, let's say, of discretion which, again, we think is
25 part and parcel of the whole analysis in this case. And this

12:09PM

1 Court recognized at the PI stage there was competing evidence
2 of discretion going in each direction.

3 You know, I read the PI opinion. I don't think
4 this one is a footnote. I think I'm just talking about the
5 text here.

12:10PM

6 THE COURT: Thank God.

7 MR. FEIGENBAUM: This Court in the PI opinion spoke
8 about how there was evidence going in either way and even made
9 comments saying there's a genuine dispute here.

12:10PM

10 So one would expect that between the PI and SJ,
11 that you have willing federal defendants who are standing up to
12 defend the lawfulness of DACA. They would be eager to present
13 information to this Court about how exactly DACA is being
14 implemented on the ground, including whether or not any
15 discretion is used.

12:10PM

16 Instead -- and we'll talk about this, I
17 understand, when we discuss the merits portion of summary
18 judgment -- we have plenty of requests to federal defendants
19 regarding information about how exactly discretion is used.

12:10PM

20 So we asked, please tell us everyone who was
21 denied and then tell us if they were denied, was it because
22 this person didn't, you know, quote/unquote meet the criteria
23 or was it because it was someone who met the criteria but
24 nevertheless did not warrant the discretionary act of DACA from
25 DHS.

12:11PM

1 That's one of the questions I think Your Honor
2 trained on in the PI stage, that it can be very difficult to
3 figure out from denial rates alone or general evidence alone
4 who exactly is being denied because this Court -- because DHS
5 thinks they didn't meet the criteria or because DHS thinks they
6 meet the criteria but shouldn't have their DACA request
7 granted.

8 So one would imagine that the federal government
9 would come forward with samples -- even if it's too burdensome
10 to look at the entire population of requests ever -- samples,
11 examples, a lot more information that could be provided. And
12 instead, interrogatory after interrogatory, they said -- this
13 is at Pages 24 to 25 of the New Jersey records submission with
14 our summary judgment opposition -- they said it's too
15 burdensome based on the case needs to take steps like that,
16 which doesn't suggest it's impossible by any means. And they
17 give hours estimates which certainly show it will take work but
18 is by no means impossible but based on the case needs are
19 choosing not to do it.

20 Well, a federal defendant that's committed to
21 defending DACA and the framework and showing that discretion is
22 inherent in the way DACA is implemented would think the cases
23 supported taking on very different verdicts and taking on very
24 different steps in order to show this Court exactly how DACA is
25 being implemented.

1 And we do think, as this Court recognized at the
2 PI stage, discretion is an extraordinarily important part of
3 this case. It always has been. I think it always will be.

4 And having federal defendants who are now eager
5 to build a record on discretion when they alone --

6 THE COURT: Didn't I in the preliminary injunction,
7 didn't I basically assume that discretion was being used and
8 still found that the states were likely to prevail?

9 MR. FEIGENBAUM: So that will take me to the merits,
10 but I just want to say that even --

11 THE COURT: We've already talked about the merits.
12 We're talking about the merits --

13 MR. FEIGENBAUM: Of course, Your Honor. The only thing
14 I wanted to say -- and I am perhaps throat-clearing up to
15 that -- is that even if Your Honor stands by that view and
16 says, yes, at summary judgment I realize there's too much
17 discretion here to be sure that that part of the procedural
18 analysis doesn't work, I'm still standing by the rest of the
19 procedural analysis -- even if that's the case, I think

20 everyone agrees that given a case of this sensitivity, having a
21 short pause of a couple of weeks so that this Court can have a
22 full record and clarity on discretion -- which of course has
23 always been a part of this case, will be a part of any appeal
24 no matter which party ends up prevailing in this case -- I

25 think will be really useful to make sure that the case is

1 really in the best possible posture in its decision and for its
2 review.

3 I'm not talking about a long pause, right?

4 Summary judgment opinions obviously often take longer than a
12:13PM 5 month anyway and so I think all of this helps show the benefits
6 that federal defendants can bring to the actual record,
7 whatever the precise final legal judgment this Court draws.

8 But turning to that legal judgment, if I think
9 that's one merit point that I can make, and I'm happy to
12:13PM 10 substantiate it, it's that we think discretion really is part
11 and parcel of the entire analysis in this case, that it isn't
12 really possible to say, well, I accept that there's a genuine
13 dispute about discretion and I'll even assume that there's a
14 lot of discretion being used -- and, again, we can talk about
12:14PM 15 that, the evidence I think that shows that.

16 If this Court is going to assume such significant
17 amount of discretion, then I actually think that infuses the
18 entire analysis on both parts of the procedural APA analysis as
19 well as getting into the substantive APA analysis.

12:14PM 20 This Court had a question about whether *Regents*
21 just kind of ends that conversation and so I thought I would
22 start there.

23 THE COURT: I think that's what I would like to hear.

24 MR. FEIGENBAUM: So I don't think that *Regents* can be
12:14PM 25 dispositive here for four different reasons.

1 The first is that *Regents*, of course, makes the
2 point that this issue is reviewable, but it's all the time the
3 case that documents can be judiciously reviewable and
4 nevertheless not have to go through notice and comments and
5 nevertheless not be unlawful, right? To be reviewable, of
6 course, is not automatically by definition unlawful.

7 So I think the *Shalala* opinion from the
8 Fifth Circuit, which of course has been an opinion this Court
9 is intimately familiar with from the DAPA case, itself doesn't
10 make any sense if you assume that reviewability and the notice
11 and comment.

12 The premise of course of *Shalala* is that a
13 document is going to be reviewable but nevertheless provides
14 the prongs to figure out whether or not under the procedural
15 APA it itself was going to be unlawful because it didn't go
16 through notice and comment.

17 And I think I can give an example that might be
18 helpful for showing why this would be.

19 Imagine, for example -- and this is a little born
20 of 2020. Imagine there's a memo that goes out that says
21 something just to the effect of: In reviewing individualized
22 requests for deferred action -- nothing more. Just someone
23 bringing it to you -- DHS should be solicitous or consider if
24 they're involved in the distribution of the vaccine. That's
25 all that it says. It doesn't say anyone is entitled to

1 anything. It says that's a factor you should think about you
2 might not have thought about in prior years.

3 That's obviously individual. That's obviously an
4 instance of total discretion, and it's just a request to
5 consider a factor.

6 That said, it may be the case that someone has a
7 legal challenge to that sort of memo, maybe they've identified
8 a provision of the INA that says something to the effect of,
9 you know, medical work isn't supposed to be relative.

10 Again, this is all obviously hypothetical.

11 So they have a legal challenge and the challenge
12 would be reviewable to whether the memo is consistent with the
13 INA, but that same memo does not necessarily have to go through
14 notice and comment rulemaking because of the amount of
15 discretion that would mean.

16 So I think that is sort of proof in the pudding
17 that you can have an example where something is reviewable; but
18 nevertheless, because of the amount of discretion that
19 continues to exist under that particular memo, it doesn't have
20 to go through notice and comment rulemaking.

21 So I think this Court finds itself in the same
22 position it frankly did before *Regents* and that's not a huge
23 surprise, I think, for two other aspects of *Regents*.

24 First, plaintiff states are obviously counting up
25 what the justices have said in different opinions. But I would

1 just note that the *Regents* majority included plenty of justices
2 who were obviously on one side of the equally divided court in
3 DAPA or on the other side. It clearly had both.

4 So it's unlikely that the *Regents* majority was
12:17PM 5 meant to resolve the separate issue that was present in things
6 like DAPA, which involved notice and comment rulemaking.

7 Instead, if you look at *Regents* 1902, that's the
8 page cite, it specifically says that we understand these
9 benefits to come from separate regulations.

12:17PM 10 So I don't understand -- I take Mr. Disher's
11 point that there's language in *Regents* that talks about, you
12 know, affirmatively conferring benefits, the way DACA might be
13 appropriate, et cetera.

14 And there's certainly language for everyone in
12:17PM 15 *Regents* itself, but I think *Regents* was specifically staying
16 away from whether challenging the DACA memo itself would be the
17 way to get at what we view as the collateral benefits.

18 THE COURT: Of course, that wasn't in front of the
19 Court in *Regents*.

12:18PM 20 MR. FEIGENBAUM: I agree. I agree it wasn't in front
21 of the Court in *Regents*, and that's why I think *Regents* isn't
22 dispositive of the question. I think that's exactly right.

23 And so I think for all of those reasons, *Regents*
24 really can't be dispositive of the question and the Court is
12:18PM 25 left in the position it was before which is trying to figure

1 out on the record before it whether there's a procedural APA
2 problem and whether that's a substantive INA problem.

3 Now, as to the procedural APA problem, if I
4 could, I just wanted to highlight what I think are the five
12:18PM 5 best pieces of evidence of discretion and then I will
6 immediately move on to why we think the rights and benefits
7 prong alone, without considering discretion, isn't enough to
8 cross the procedural APA hurdle at summary judgment.

9 So the five best pieces of evidence that I think
12:18PM 10 really -- three of which weren't even before this Court at the
11 PI stage. There's of course the internal DHS documents -- this
12 was at the PI stage -- where you have the Texas Service Center
13 in 2015 using what I term the neighbor test, essentially saying
14 you've got to figure out if this person would be someone you
12:19PM 15 would want as your neighbor. That's Docket 215-1 at 405.

16 You also have internal testimony, this is the
17 Neufeld testimony that was before this Court at the PI stage,
18 Docket 6 at 279-96 where he specifically says DACA involves
19 discretion both in considering the factors and in deciding
12:19PM 20 whether someone merits discretion even once they've satisfied
21 the factors.

22 So we think those two pieces of evidence were
23 really helpful, but we think there's more now.

24 So we think the Wolf and Edlow memos, even if
12:19PM 25 they're set aside in *Batala Vidal*, are incredibly illustrative

1 to the kind of discretion that DHS is using.

2 There's nothing in the *Batalla Vidal* order that
3 would prevent DHS from using greater discretion when they
4 review applications if that's what the leadership of DHS wants
5 them to be doing.

12:19PM

6 And so the Edlow memo in particular requires the
7 creation of new SOPs and new training materials that
8 specifically instruct all reviewing DHS agents on the amount of
9 discretion that they're supposed to use here.

12:20PM

10 So even if there was question before Wolf and
11 Edlow, there isn't question now. And, again, this is an
12 injunctive relief case. This is about whether the federal
13 defendants right here right now are violating the law and
14 therefore whether a federal court needs to step in.

12:20PM

15 So to a degree, that discretion is shot out after
16 Wolf and Edlow and there's nothing in the record to suggest
17 that they're lying or that the SOPs and new training materials
18 aren't being followed, then that's more evidence, I think,
19 still of discretion.

12:20PM

20 There's also the increase in the denial rates
21 that we've talked about back and forth in everything between
22 plaintiff states and the various intervenor defendants.

23 We have identified that for initial DACA
24 applications from 2018 -- I believe from September 2018 until
25 2020, we're now looking at something more like a 42 percent

12:20PM

1 denial rate. There's some back and forth on the facts about
2 whether that's polluted by any individuals who simply weren't
3 eligible for DACA at all.

4 But, again, the sharp increase in the denial rate
12:20PM 5 based on the administration that has hostility to granting of
6 DACA requests, I think is really illustrative to the amount of
7 discretion that exists.

8 And then finally we also have on the record
9 federal defendants admitting, quote, anecdotally they are aware
12:21PM 10 of instances in which some individuals or at least two
11 individuals have received DACA -- or did not receive DACA that
12 otherwise were eligible for it.

13 Now, again, I'm not going to stake my hat on that
14 number itself even though it's just anecdotal, but I think
12:21PM 15 that's actually more proof of the adversity problem that we
16 have federal defendants who merely should be defending their
17 program specifically saying: We're anecdotally aware, but
18 we're not going to run down more details, we're not going to
19 give you more information about how that worked, and we're not
12:21PM 20 going to be providing any samples to figure out how often
21 that's happening. So there's a lot of evidence of discretion
22 here.

23 Now, I think Your Honor has said, okay. I think
24 that there's discretion. I'll accept that there's discretion.
12:21PM 25 Don't you lose anyway?

1 And I think that gets to the rights or benefits
2 prong. And I think the basic principle here and the way to
3 think about this test is that this Court would have to find --
4 if it agrees with us on discretion or agrees there's genuine
5 material facts on discretion, that no amount of discretion, no
6 amount of discretion could show that this was a generalized
7 policy or even no amount of everything provided in this record
8 could show that that's --

9 THE COURT: Why does that matter?

10 MR. FEIGENBAUM: So the reason that that matters -- so
11 this Court in the PI opinion, I think, grapples with how these
12 prongs operate, whether in tandem or as two totally separate
13 prongs.

14 Obviously if they're two totally separate prongs
15 and both must be satisfied, then plaintiff states obviously
16 lose.

17 But this Court found that there are two factors
18 that come together in a single analysis. Now, if that's right
19 and you've got two factors in the analysis, then sort of
20 necessarily the Court has to find that the other prong is so
21 strong that nothing on the discretion prong could overcome it,
22 no amount of discretion in that balancing analysis could be
23 enough to overcome what the rights or benefits prong shows.

24 And I don't think that could be quite right
25 because as I understood plaintiff states' position and even

1 aspects of the PI opinion, no one is saying that if an
2 individual totally separate from DACA requests deferred action
3 and receives deferred action in a truly one-off case, that that
4 alone would be the problem in and of itself --

12:23PM

5 THE COURT: There's a third alternative though.

6 MR. FEIGENBAUM: I'm sorry, Your Honor. I didn't hear
7 that.

8 THE COURT: There's a third alternative. Instead of an
9 "and," it can be an "or."

12:23PM

10 MR. FEIGENBAUM: Sure. But I think my example would
11 work either way, and I can walk through.

12 So whether it's rights or benefits separate from
13 discretion still works on this one-off example. So in the
14 one-off example, the person would have deferred action. Let's
15 say -- I'll go back to my vaccine example.

12:23PM

16 Let's just say the inventor of the vaccine had
17 been here without documentation -- so, again, hypothetical --
18 and the federal defendants wish to defer an action for that
19 individual for the years while the vaccine is being distributed
20 because they would have concerns in that one-off case.

12:23PM

21 That would, based on the 1980s regulations that
22 have been in effect consistently since, mean that that person
23 would collaterally get work authorization.

24 The same rights would obtain, the same benefits
25 would obtain; but it's not at all clear to me that there's the

12:24PM

1 same legal problem by any means that this Court identified at
2 the PI stage.

3 THE COURT: So all the talk that Justice Roberts made
4 in *Regents* about all the benefits that go along with DACA, I
12:24PM 5 mean, he was just wrong?

6 MR. FEIGENBAUM: No, no, no, not at all. And I know
7 better than to call the Chief Justice wrong, let alone in open
8 court.

9 I think I have two points on that. The first is
10 our point is that essentially the wrong thing has always been
11 challenged here, so it's not that DACA leads to the collateral
12 effect.

13 So I think my one-off example is really obvious
14 there. The challenge wouldn't be that this particular doctor
15 merited deferred action. He would sue the federal defendants
12:24PM 16 and say, you violated some sort of notice and comment
17 requirement by not using notice and comment when you deferred
18 this person's -- when you granted this person deferred action.

19 Instead, you would say, sure, you granted him
20 deferred action. You don't need to go through the notice and
21 comment. That's a purely discretionary act. You really used
22 your total discretion there. That had collateral consequences.
23 The rights and benefits offend us and we're going to have to
24 challenge that regulation.

12:25PM 25 And Your Honor's point on severability, I think

1 is really illustrative and might help prove the point I'm
2 trying to make here.

3 THE COURT: I don't know if it was my point or my
4 question.

12:25PM

5 MR. FEIGENBAUM: I think it's fair. The question, I
6 think, might serve a point I want to make is perhaps a fairer
7 way to say it.

12:25PM

8 So, you know, severability I think really
9 illustrates the problem here. I think there's some thought
10 that what could happen or a possible remedy would be to defer
11 action but not to have any collateral consequences to come with
12 that, then that's not about the 2012 DACA memo itself at all.
13 And this, I think, *Regents* does stand for at Page 1902 of the
14 opinion.

12:26PM

15 The problem there would be with those preexisting
16 regulations which essentially set up an equation that said if
17 deferred action, then eligibility for work authorization if you
18 have economic necessity.

12:26PM

19 If that is always a problem for the person who
20 got the vaccine, the single individual who got it or DACA
21 recipients, then the problem is not the DACA memo and the
22 problem is not the one-off grant. The problem would be with
23 the 1980s regulation, the one that set up this equation: If
24 deferred action, then you would have work authorization
25 assuming economic necessity can be shown.

12:26PM

1 And, again, that could be challenged; and I don't
2 think *Regents* disposes of what has to be challenged. That
3 could be challenged in a petition for rulemaking under
4 Section 553(c) and would not be part and parcel of the
5 challenge to DACA itself.

6 So we've always thought that a bit of the wrong
7 thing is being challenged here because the deferral of action
8 or the factors to consider in deferring action themselves do
9 not have to go through notice and comment rulemaking so long as
10 sufficiently high discretion is there. Just as you don't need
11 notice and comment to defer the action of a single individual
12 who is receiving the vaccine and just as you don't need notice
13 and comment to say when you look at one-off applications,
14 please just consider the factor --

15 THE COURT: What about the fact that Secretary
16 Napolitano's memo says: For individuals who are granted
17 deferred action, the USCIS shall accept applications? I mean,
18 that's part of the DACA memo.

19 MR. FEIGENBAUM: So she's following the regulation in
20 that case. I mean, she's just actually following the notice
21 and comment regulation. I think it would be a real problem if
22 the DHS secretary in a memo is saying, you know, there's a
23 regulation on the books, but I don't particularly like it. I
24 don't particularly want to follow it.

25 I think we would have questions about the

1 propriety of doing something like that. She's not saying, I'm
2 creating some sort of new right from DACA itself that never
3 before existed. Every deferred action -- and there are plenty
4 of deferred actions -- you know, family fairness. This Court
5 is well aware of that history. All of those examples tie to
6 the 1980s regulations and lead to the same equation that
7 Secretary Napolitano talked about in 2012.

8 And that's something that I think the Wolf and
9 Edlow memos are particularly instructive on. You know, what
10 they say is we want to maximally use discretion and we want to
11 cut off advance parole. We really don't think advance parole
12 is a live issue anymore in the way plaintiff states are talking
13 about because they make very, very clear you have to get a
14 one-off, meeting the statute, humanitarian reason, needing
15 life-saving treatment and a significant public benefit like law
16 enforcement reasons, national security reasons --

17 THE COURT: Is there any viability to that memo
18 anymore?

19 MR. FEIGENBAUM: So we think so. So the Edlow memo
20 itself -- first of all, we think it could be viable if there's
21 an appeal, we think it could be viable if it's repromulgated.

22 And, again, we're just in a couple of weeks'
23 window right now with this authority problem, all of which is
24 clearly going to go away very soon. That would get back to my,
25 you know, line of reasoning.

1 But even on the merits, we think that those memos
2 are instructive not for their formal, binding nature but
3 because the Edlow memo itself says we haven't granted advance
4 parole to a DACA recipient since 2017. You don't need the memo
12:29PM 5 by someone who is validly appointed to accept that DHS is
6 identifying as a matter of fact that they know DACA does not
7 immediately lead to advance parole.

8 The Edlow memo itself said the 2012 memo did not
9 give anyone rights to advance parole, did not change the
12:29PM 10 standards for advance parole. So, you DHS officers, who are
11 reviewing requests for advance parole, you need to look for the
12 statutory rules.

13 THE COURT: But what you're arguing is that the states,
14 assuming they have a valid complaint and assuming they have
12:30PM 15 statutes, never can challenge anything because it's not the
16 DACA memo that's doing it. It's how they're enforcing the DACA
17 memo, how they're implementing it.

18 So even though their handbook says you have to
19 give these people, let them apply for advance parole or you
12:30PM 20 have to let them apply and even though it's the DACA -- grants
21 of the DACA status that gives them the right to work or the
22 right to get an EAD, you know, by challenging DACA, you're not
23 challenging the right thing, you should be challenging all the
24 regulations that implement it and why aren't they challenging
12:30PM 25 that? That's the whole -- again, back to my ball of wax, I

1 think.

2 MR. FEIGENBAUM: Well, I think Ms. Perales has, you
3 know, pushed back on the ball of wax.

4 But I think that very briefly the two main
5 responses to that, the first is we've always said from day one
6 we've never tried to hide the ball, that we think they're
7 challenging the wrong thing when it comes to work authorization
8 and this came up in the DAPA litigation as well.

9 THE COURT: I know, and the Fifth Circuit rejected that
10 argument.

11 MR. FEIGENBAUM: So the Fifth Circuit had a very
12 different set of concerns. The Fifth Circuit did not have the
13 evidence of discretion before Your Honor. So in that context
14 without that discretion the putative link to rights and
15 benefits alone were of sufficient concern, because the Fifth
16 Circuit perceived it as a class-wide grant of rights or
17 benefits, which our point is that's not what's before this
18 Court at summary judgment. There are discretionary decisions
19 under DACA and those are collateral consequences. That's a
20 very different scheme than a class-wide grant of rights or
21 benefits.

22 Then they have separate issues under the
23 substantive INA prong that don't apply to DACA involving direct
24 conflict of provisions for parents. So there are aspects the
25 defendants want that really just don't ultimately control the

1 instant litigation.

2 So I think that that's parts of the point there.
3 But then the other point is the reason why it's always boiled
4 down to implementation is because plaintiff states themselves
12:32PM 5 asked this Court to ignore the language in the Napolitano memo
6 that talks about using discretion. They think that's a lie and
7 they think *Texas I* substantiates that.

8 This Court found in the preliminary injunction
9 stage -- well, actually there is a lot of evidence that
12:32PM 10 suggests that was true. So if we were just looking at the text
11 of the memo alone on discretion, it would be right there, that
12 finding of discretion would be proper; and the *Crane* case out
13 of Fifth Circuit basically made that point.

14 The plaintiff states are saying, well, in
12:32PM 15 implementation, it's not really and we're saying, well, then
16 you need to look at implementation as it develops over the
17 years.

18 And as it has developed over the years, it is
19 only more and more clear, including in this case, that there is
12:32PM 20 discretion in implementation and that discretion is great at
21 implementation and, therefore, this Court would have to find
22 that the rights or benefits of plaintiffs is so overwhelming,
23 that no amount of actual one-off calls for discretion would be
24 able to overcome it.

12:33PM 25 And we don't think that's the record or the case

1 law in front of this Court because we do think there's a lot of
2 discretion here that needs to get deferred into a merits ruling
3 to actually make those discretionary findings or have federal
4 defendants willing to present discretion to Your Honor, that I
12:33PM 5 think would really helpfully illuminate the issues and put a
6 finer point on the complete resolution of them because *Regents*
7 doesn't dispose of it and none of the other claims, I think,
8 do. We really think discretion is the whole ball of wax still,
9 Your Honor.

12:33PM 10 THE COURT: Okay. Thank you.

11 MR. FEIGENBAUM: Thank you, Your Honor.

12 THE COURT: Here is what I'm going to do. I'm going to
13 let Mr. Coghlan go and then let Mr. Disher respond and then
14 talk about remedies, but I want five minutes. My Diet Coke is
12:33PM 15 running out.

16 MR. FEIGENBAUM: Thank you, Your Honor.

17 (Court is in recess.)

18 THE COURT: All right. Be seated.

19 All right. Mr. Coghlan, you or Mr. Hu want to
12:46PM 20 weigh in?

21 MR. COGHLAN: Briefly, Your Honor.

22 Your Honor, the federal defendants and
23 specifically the Department of Homeland Security are still
24 considering the difficult questions on what the next steps
12:46PM 25 should be regarding DACA in light of the Supreme Court's

1 decision in *Regents*.

2 Your Honor, the Supreme Court did not opine on
3 the legality of DACA in its opinion. It recognized that DHS
4 had the authority to rescind it if they wanted to.

12:47PM

5 What it did say was, and as Your Honor touched
6 on, that DACA was more than a symbol of nonenforcement policy,
7 that it's an inferred program for conferring affirmative
8 immigration relief and that it at least allows access to a
9 number of intended benefits including Medicare and Social
10 Security. And as Your Honor suggested, because of that, the
11 Court found that it was appropriate for reviewing the APA.

12:47PM

12 So against that backdrop, Secretary Wolf in his
13 July memo -- and of course we recognize that memo was vacated
14 by the Court in the Eastern District of New York and defendants
15 are currently complying and taking every effort to comply with
16 that injunction.

12:47PM

17 But the policy concerns that were outlined in
18 Secretary Wolf's memo were still ones that DHS is considering.
19 And so what he said was whether to --

12:48PM

20 THE COURT REPORTER: Would you repeat after "what he
21 said was"?

22 THE COURT: When you're looking down to read, you're
23 lowering your voice.

24 MR. COGHLAN: Understood, Your Honor. My apologies for
25 that.

1 He said, whether to retain the DACA policy
2 presents significant questions of law and legal policy and
3 presents serious policy concerns that may warrant its full
4 rescission. But at the same time I've concluded that fully
12:48PM 5 rescinding the policy would be a significant administration
6 decision that warrants additional careful consideration.

7 And that is still what the department is doing as
8 of today, Your Honor. And so, you know, while it's continuing
9 to consider these concerns or consider these difficult issues,
12:48PM 10 it does plan to continue to implement DACA. As we stand here
11 today, that would be under the terms of the Napolitano memo and
12 in compliance with the Eastern District of New York's
13 injunction which vacated the Wolf memo. What's left
14 controlling is only the Napolitano memo at this point.

12:49PM 15 The Napolitano memo has been in effect this whole
16 time and has been affecting, impacting what is DACA this whole
17 time; so that has not changed since 2012.

18 But what has changed is kind of these additional,
19 the Wolf and Edlow memos which impacted directly how the
12:49PM 20 Napolitano memo was to be implemented. Those have been vacated
21 and so right now it is only the Napolitano memo that is being
22 enforced. DHS still plans to implement DACA under those terms
23 for the foreseeable future.

24 THE COURT: Based on the court order?

12:49PM 25 MR. COGHLAN: I'm sorry, Your Honor?

1 THE COURT: Based on the New York court order?

2 MR. COGHLAN: Well, the New York court order vacated
3 the Wolf memo and basically took that out of existence. So all
4 that is left is the 2012 memo for now that is looking into -- I
12:49PM 5 will say the acting solicitor general has not made a
6 determination on appeal in the Eastern District case yet and I
7 don't want to say anything that would limit his ability to do
8 that.

9 But I think either way, the 2012 Napolitano memo
12:50PM 10 is still in effect and the department continues to abide by
11 that for the foreseeable future.

12 So as I've suggested, Your Honor, we appreciate
13 that this Court has already ruled as a matter of law that DACA
14 is likely substantively unlawful because it violates the INA
12:50PM 15 and the federal defendants acknowledge that it is bound by the
16 Fifth Circuit's precedential ruling as the legality of DAPA and
17 the standard of DACA in the Texas ruling and will very likely
18 not depart from its own prior rulings finding that DACA is
19 manifestly contrary to the statutory scheme promulgated by
20 Congress and the INA.

21 We do have views on the potential remedies,
22 Your Honor, but I understand --

23 THE COURT: In just a moment. I'm going to let
24 Mr. Disher -- I'm going to untie his hands and he can hit back.

12:50PM 25 MR. DISHER: Thank you, Your Honor. Happy to do it. I

1 just have a few brief things to say in no particular order.

2 First of all, in relation to advance parole and
3 the discussion about who is or who is not eligible for advance
4 parole, I will just point the Court to our reply brief filed on
12:51PM 5 November 20th, Docket Number 529, ECF Page 14, where we had
6 cited to the U.S. Customs and Border Patrol's website on which
7 it, in fact, says: "Aliens in the United States are not
8 eligible for advance parole if they are...in the United States
9 illegally."

12:51PM 10 DACA of course has removed that provision for its
11 recipients meaning that they are now eligible for advance
12 parole which can lead to that pathway to citizenship.

13 I heard the lawyer for the defendant-intervenors
14 frame this case as such. She said DACA has two components and
12:51PM 15 I think everybody agrees on the first component which is
16 forbearance from removal.

17 But then she went on to say, plaintiffs argue
18 that there is a second component to DACA, which is work
19 authorization and the benefits that go along with that lawful
12:52PM 20 presence.

21 Your Honor, it's not just the plaintiffs that
22 argue that; nine justices of the United States Supreme Court
23 have now agreed with the plaintiffs' position on that point.

24 In particular, Chief Justice Roberts says, in no
12:52PM 25 uncertain terms DACA is not simply a nonenforcement policy. In

1 short, the DACA memorandum does not announce a passive
2 nonenforcement policy. It created a program for conferring
3 affirmative immigration relief. The creation of that program
4 and its rescission is an action that provides focus for
12:52PM 5 judicial review. The benefits attendant to deferred action
6 provide further confirmation that DACA is more than simply a
7 nonenforcement policy.

8 That is precisely what the plaintiffs are
9 challenging in this case. It is not removal forbearance; it is
12:53PM 10 removal forbearance plus all of the attendant rights and
11 benefits granted to the DACA recipients through the executive
12 action.

13 DHS and the federal defendants, of course, they
14 could have issued a different memo and Chief Justice Roberts
12:53PM 15 again acknowledges this. They could have issued a memo that
16 simply said, we are going to forebear from removing this
17 particular class of individuals. But that does not mean that
18 these individuals are considered lawfully present and eligible
19 for all of the attendant benefits that come along with that.

12:53PM 20 And Chief Justice Roberts recognizes this in
21 Footnote 5, where he says lawful presence is a statutory
22 prerequisite for a receipt of certain benefits. It is not the
23 same as forbearance nor does it flow inexorably from
24 forbearance.

12:54PM 25 So DHS could have potentially said, we are simply

1 forbearing from removing this particular class of people. That
2 would be a completely different case.

3 But what this Court has in front of it is a memo
4 that does more; and that's, in fact, acknowledged by DHS itself
12:54PM 5 or -- excuse me -- USCIS. And this is Exhibit 4 to our motion
6 for summary judgment which is the frequently asked questions.

7 Question Number 1: "What is deferred action?"

8 It goes on and then it says: "An individual who
9 has received deferred action is authorized by DHS to be present
12:54PM 10 in the United States and is therefore considered by DHS to be
11 lawfully present during the period deferred action is in
12 effect."

13 They did not have to say that. They could have
14 said, we are simply forbearing from removing this group of
12:54PM 15 people; but of course they went further as now all of the
16 members of the Supreme Court have recognized.

17 In that recognition, just to respond to this idea
18 of discretion and how DACA is being implemented, in the Supreme
19 Court's recognition of those aspects of the DACA program, the
12:55PM 20 Supreme Court never once talks about discretion or how DACA is
21 being implemented, meaning that this Court only needs to look
22 at what DACA did the day that it was enacted and the rights and
23 benefits that flow from that program.

24 So we contend certainly that the evidence shows
12:55PM 25 that the federal defendants continue not to exercise

1 discretion. There was no discretion being exercised before the
2 2017 rescission attempt and what the evidence shows is that
3 even since that attempted rescission, the grant of renewal DACA
4 applications is over 99 percent.

12:55PM 5 Again, that's all in our briefing. So there was
6 no discretion when they were originally granted DACA status and
7 now there continues to be no discretion being used for that
8 population that has already received DACA.

9 But even setting discretion aside, as this Court
12:56PM 10 has acknowledged in ruling on the preliminary injunction and as
11 the Supreme Court has made clear, we don't even need to talk
12 about discretion to get to the fact that DACA itself, the 2012
13 memo is unlawful, both substantively and procedurally.

14 And then finally, Your Honor, there simply is no
12:56PM 15 reason to exercise additional delay in this case. We of course
16 filed our lawsuit in May of 2018. President Obama overstepped
17 his authority when his administration issued the DACA
18 memorandum in 2012, and nothing now can change that.

19 This Court is being asked to rule on the 2012
12:56PM 20 memorandum that created the DACA program. There is no
21 additional reason now to delay. That program was unlawful at
22 its inception, and it continues to be unlawful today.

23 THE COURT: Okay. All right. Let's switch gears and
24 talk about remedies.

12:57PM 25 And I want to -- I'm giving everybody what I'll

1 call blanket immunity for right now that obviously -- and I'm
2 reading from the states' proposed order that the plaintiffs'
3 motion for summary judgment is granted and the 2012 memorandum
4 that created the DACA program is set aside. So I assume that's
5 Mr. Disher's preferred remedy.

12:57PM

6 I'm assuming your preferred remedy, the
7 defendant-intervenors, is that I grant your summary judgment
8 and say they don't have standing.

9 So I'm taking those two things as assumptions and
10 I'm -- I know it's kind of in a little bizarre way to ask but I
11 think it needs to be probed. Let's assume for a minute -- I'm
12 going to start with the intervenors. Let's assume that Texas
13 convinces me that it either violates the APA or the take care
14 clause hypothetically. I know you're not conceding anything.
15 What remedy should I -- what is the remedy?

12:58PM

16 MR. FEIGENBAUM: Thank you, Your Honor. We appreciate
17 the chance to chat about the remedies.

18 So I want to talk both briefly about the
19 plaintiff states' proposal for the set aside and then also what
20 our proposal, which would be I think a remand without vacating
21 the memo in the interim which is I think most consistent with
22 the *Regents* opinion.

12:58PM

23 THE COURT: A remand to the DHS?

24 MR. FEIGENBAUM: To DHS, yes.

12:58PM

25 So first I just want to talk briefly about the

1 set aside request and maybe we'll get some clarity this
2 morning. But as I understood it, they're essentially saying,
3 well, under the plain terms of the statute, if you find that
4 the 2012 DACA memorandum is the operative one in front of you
5 and it's unlawful, then you have to just set it aside.

6 And I don't totally -- if I'm following it
7 correctly, that essentially means that by that logic, there's
8 never any discretion. Once you find summary judgment in a sort
9 of regulatory APA case, the relevant regulation or memo or
10 whatever is before you has to be just set aside or vacated.

11 That's obviously contrary to the way the case law
12 works and to this Court's own concerns about sort of nationwide
13 injunctions. If you're just automatically vacating any sort of
14 policy, memo, regulation in front of you based on the plain
15 language of the APA, then in every case, you're just on a
16 nationwide basis enjoining the memo.

17 Maybe we'll get some clarity and I'm
18 misunderstanding the plaintiff states' position; but at least
19 if that's the position, then it's obviously a radical expansion
20 of the way that nationwide relief would work.

21 THE COURT: Well, it's the way it's worked not only in
22 the DAPA case; but it's the way it's worked in every case since
23 then. And the reason -- and I don't know this. I've not
24 talked to the various judges that handled the challenge to the
25 DACA rescission. But the reason they all did -- when they

1 issued an injunction, they made it nationwide is because -- and
2 I say "all." I mean, most of them -- is because it's hard to
3 slice and dice immigration law.

4 You can't say, okay, we're going to have
01:00PM 5 immigration law for Texas be X and for New Mexico and Arizona
6 be Y. And if you remember, in the preliminary injunction order
7 I issued, I actually talked about that and it's one of the
8 reasons I'm raising it today.

9 I mean, you know, if there's a way to slice and
01:01PM 10 dice it, I think any court would welcome anything that made
11 sense. Number one, on the scale of it, should it be
12 nationwide? There have been, as you know, there have been some
13 people that say you should rule just for your circuit or just
14 for, you know -- but that would ruin the uniformity of it.

01:01PM 15 But I do want to hear those suggestions. But
16 also I'm asking with regard to slicing and dicing, not
17 necessarily the scale of it, but the order itself then. By
18 "order," I mean Secretary Napolitano's memo.

19 MR. FEIGENBAUM: So in that case I think it gets to,
01:01PM 20 you know, let's just assume we're figuring out slicing and
21 dicing, what would we do here. And so I can lead off with ours
22 and we can talk about the slicing.

23 So in terms of what we would propose --

24 THE COURT: Those are all technical terms. They go
01:02PM 25 with "ball of wax," "slicing and dicing."

1 MR. FEIGENBAUM: We're creating a whole new *Black's Law*
2 chapter today.

3 THE COURT: That's right. Bryan Garner would be
4 thrilled.

01:02PM

5 MR. FEIGENBAUM: Exactly. So I just want to say why we
6 think remand without vacatur is the appropriate thing to do
7 here -- remanding to DHS without vacating it in the meantime.

01:02PM

8 So the Fifth Circuit has walked through that as a
9 sort of ever-available option in APA cases, including cases
10 where plaintiff states or any sort of plaintiff is coming
11 forward and saying, please set it aside, there's always the
12 option to remand without vacating.

01:02PM

13 And the two factors that the Fifth Circuit has
14 identified, like the DC Circuit and like plenty of other
15 circuits have done, is that you would do that sort of remand
16 without vacating in the interim based on the disruption that
17 any court order might have and based on the flexibility the
18 agency would have on remand.

01:03PM

19 So I think of one case that's illustrative of
20 that point but there are really quite a lot for that
21 proposition. So it's essential in *Southwest Services versus*
22 *EPA*. That's 220 F.3d 683, which is a 2000 decision from the
23 Fifth Circuit. It's just illustrative. There are a lot of
24 examples.

01:03PM

25 And we think those factors here are

1 extraordinarily compelling for pointing to not vacating
2 immediately before the memos that are in front of the Court and
3 instead remanding to DHS.

4 So the first is disruption. This Court is well
01:03PM 5 aware of the way the egg has been scrambled because this Court
6 put quite a lot of detail on it in its preliminary injunction
7 opinion.

8 And so I will just note on top of that opinion,
9 we of course entirely agree with this point. We think there's
01:03PM 10 a lot of new evidence in summary judgment that continues to
11 show the way individual DACA recipients will have their lives
12 entirely disrupted and then the effects that that will have on
13 states like New Jersey, local governments within New Jersey,
14 universities in New Jersey, and the medical industry within
01:03PM 15 New Jersey.

16 We've included all sorts of evidence at summary
17 judgment about doctors; women who do registration at COVID
18 testing sites; individuals who do site visits for distressed
19 homes, part of our Child Protection Program, even when they
01:04PM 20 know there's a COVID-positive parent there.

21 So there's extensive examples of disruption that
22 I think any sort of immediate injunction would have.

23 The second question comes to flexibility. As
24 this Court has noted, this is an unusual case. This is a case
01:04PM 25 where we have a Supreme Court opinion about a rescission of a

1 memo that is being challenged in this case; so it's obviously
2 not every day.

3 And what the Supreme Court identified in *Regents*
4 is that even assuming DACA is unlawful -- which, again, we are
01:04PM 5 assuming for this exact conversation -- so assuming DACA is
6 unlawful, DHS has extraordinary flexibility in how it needs to
7 think about reliance interests, what that means on the ground.

8 The *Regents* opinion specifically says: Deciding
9 how to best address a finding of illegality going forward can
01:05PM 10 involve important policy choices, especially if the finding
11 concerns a program with the breadth of DACA. Those policy
12 choices are for DHS.

13 Now, I'm not saying this Court doesn't have any
14 role in the slicing and dicing. Of course it does. But this
01:05PM 15 Court's role is exactly what *Regents* identified in the
16 rescission context, as the backstop to review what actions are
17 arbitrary and capricious.

18 The answer, if this Court believes DACA is
19 unlawful, is to remand to the agency in the first instance to
01:05PM 20 make the policy calls that *Regents* has said it can make and
21 that this Court would be telling it to make.

22 And then if the plaintiff states are unhappy with
23 the way the policy calls are made or any other parties are
24 unhappy, there will be a challenge in front of Your Honor and
01:05PM 25 Your Honor, in an arbitrary and capricious framework, will have

1 the opportunity to review the consistency with the law based on
2 the actions that were taken on remand.

3 That would be the normal course. It wouldn't be
4 in light of the *Regents* opinion for this Court to, I think,
01:06PM 5 step out on a limb and decide the precise remedy.

6 The Supreme Court could have done that too. If
7 that was the answer to a finding of unlawfulness, then *Regents*
8 would have done more. But *Regents* said, we accept
9 unlawfulness, now, DHS, do your work on policy questions.

01:06PM 10 Federal defendants say that's the process that's
11 already ongoing and we imagine would continue ongoing after any
12 decision by the Court and so any decision by this Court should
13 be followed by a remand.

14 THE COURT: Okay. Anybody else want to weigh in?
01:06PM 15 Ms. Perales?

16 MR. DISHER: I certainly do.

17 THE COURT: Why did I know that?

18 MR. DISHER: Thank you, Your Honor.

19 So as for the remedy, I think what New Jersey and
01:06PM 20 to a lesser extent the DACA intervenors are asking for is quite
21 extraordinary. They're asking for this Court to -- again, in
22 the hypothetical -- find that an agency action is unlawful
23 contrary to the statutory authority that that agency has and
24 then let that agency action stay on the books while they try to
01:07PM 25 fix it. Now --

1 THE COURT: Well, can't they go back and fix it?
2 Couldn't they go back and propose DACA and have notice and
3 comment and come on through?

4 MR. DISHER: A couple of things on that.

01:07PM 5 THE COURT: All right.

6 MR. DISHER: The remedy that we're seeking here --
7 first, just to be crystal clear -- is not simply an absolute
8 set aside, the 2012 DACA memorandum is gone as of today.
9 That's not what we're seeking.

01:07PM 10 That is the first step of what this Court should
11 do, but we fully acknowledge that the Court has the equitable
12 power to stay the effect of that set-aside for a certain period
13 of time.

14 And let me give the Court an example in this
01:07PM 15 particular context. The district court from the District of
16 Columbia did exactly this with the 2017 rescission memo. On a
17 summary judgment final ruling posture, the district court said,
18 the 2017 rescission is unlawful. I am, therefore, setting it
19 aside as is mandated by the APA; but I'm going to stay the
01:08PM 20 effect of my ruling for a certain number of days to allow the
21 federal defendants to try to redo it.

22 We are in no way seeking an injunction saying
23 that the federal defendants can never retry to do anything.
24 But all we're here to decide about today is the only agency
01:08PM 25 action that's in front of the Court which is the 2012 DACA

1 memorandum. So we are not, again, seeking an injunction saying
2 the federal defendants are precluded from ever doing anything
3 in this field ever again. If they do that -- or I should say
4 maybe when they do that, we can reevaluate that agency action
01:08PM 5 on its merits; consider litigation against that; or if it
6 complies with all of the APA and the constitutional framework,
7 then it's great.

8 But all we're saying here today is that the 2012
9 DACA memorandum exceeded their statutory authority. So the APA
01:09PM 10 is clear on what happens -- on what remedy is required in the
11 first instance which is to set it aside.

12 It is not, in fact, an injunction. This is
13 different than a challenge to a statute. And there's a really
14 good law review article called *The Writ-of-Erasure Fallacy* that
01:09PM 15 goes into this, written by Jonathan Mitchell, talking about the
16 difference between an injunction against a statute and an APA
17 challenge against an agency's action. When the Court is asked
18 to rule on a statute, it cannot erase the statute, it merely
19 enjoins the governmental actor from enforcing that statute.

01:09PM 20 The APA is different. If there is an APA
21 challenge to an agency action, the Court actually is empowered
22 and I would argue required to set that action aside as if it
23 never existed. Not only is that what happened in the DC court,
24 but the Supreme Court in fact affirmed that remedy in the
01:09PM 25 *Regents* opinion saying that the DC court did it right. They

1 affirmed the complete vacatur of the 2017 DACA memorandum.

2 And so we know from that reasoning that what this
3 Court has to do in the first instance is to set aside the 2012
4 DACA memorandum. But we are not arguing by any means that the
5 Court's hands are then bound at that point because the Court
6 clearly has the authority to stay the effect of that ruling for
7 a certain period of days.

8 And that is why we have suggested to the Court
9 various options in our briefing about how best to do this and
10 this -- one would be a complete set aside of the DACA
11 memorandum but stay the effect of that for two years. That
12 would allow some appellate review of this Honor's ruling, it
13 would also allow those who have existing grants of DACA some
14 certainty about when those grants would potentially end, but it
15 wouldn't be today, it wouldn't be tomorrow. It would be kind
16 of an orderly wind down of the program.

17 Another example would be to stay the effect of
18 this Court's ruling as it applies to folks who have an existing
19 grant of DACA through the program. In other words, no new
20 grants, no new advance parole, no renewals; but everybody who
21 has a DACA grant for the next year or two years, however long
22 it may be, you can let that expire, you know, based on its own
23 terms.

24 So just to be clear, we are not saying that this
25 Court has to set aside DACA today and all grants of deferred

1 action pursuant to the program are thereby vacated. But what
2 the Court has to do if it finds DACA unlawful, is to set aside
3 the agency action in the first instance and then craft whatever
4 remedy it may do on the back end.

01:11PM 5 There is simply no reason to leave the unlawful
6 program in place while the federal defendants do whatever it is
7 they're going to do if anything -- there's a chance that they
8 don't do anything -- and then we have no effective relief.

9 And then also whatever action they do take, the
01:12PM 10 history of this case has shown that that action is likely going
11 to be bound up in federal litigation and so the only way for
12 the plaintiffs to get an effective measure of relief in this
13 case is for the 2012 memo to be set aside in the first instance
14 and then we have proposed two different alternatives for the
01:12PM 15 Court to exercise its equitable powers to consider whatever
16 reliance interests there may be and help the process go through
17 appellate review and allow DACA recipients to prepare for the
18 ultimate set aside of the program.

19 THE COURT: Mr. Coghlan, do you want to weigh in?

01:12PM 20 MR. COGHLAN: Yes, Your Honor.

21 Your Honor, as I understand the hypothetical
22 Your Honor placed before us is what to do if the Court decides
23 that DACA is substantively unlawful, how to grant its remedies.

24 So as I understand that --

01:12PM 25 THE COURT: We're waving good-bye to Louisiana.

1 MS. MURRILL: Thank you. It was nice being with you,
2 Judge.

3 MR. COGHLAN: And the federal defendants' view,
4 Your Honor, is that you craft any remaining order in such a way
01:13PM 5 it still provides DHS with the opportunity to consider how to
6 conduct an orderly wind down of the program and consider the
7 reliance interests that were handed down by the Court in the
8 *Regents* decision.

9 If Your Honor intends to rule in this fashion, we
01:13PM 10 think the issues are complex enough that it would benefit from
11 additional limited, focused briefing purely on what that should
12 look like and how long it should take.

13 I think that it need not prevent the Court from
14 issuing a finding prior to that briefing, as the Court actually
01:13PM 15 did in EDNY, or issued its legal determination in that and
16 invited additional briefing from the parties on remedy.

17 You know, the issues here are complicated enough
18 and DHS is still working through them, as instructed by the
19 Court in *Regents*.

01:13PM 20 To that extent we think that whatever the Court
21 does, it should recognize that DHS will need some flexibility
22 and time to wind the program down if it is determined to be
23 unlawful.

24 And for more specifics, we think that the Court
01:14PM 25 would benefit from additional, again, limited, focused briefing

1 on this.

2 THE COURT: All right. Anyone else want to add
3 anything?

4 MR. FEIGENBAUM: Your Honor, if I may, just two
5 clarifying points.

6 The first is, you know, I had said in my initial
7 comments on remedy that I wasn't sure how broad the position of
8 plaintiff states was in terms of when you would have to do set
9 asides of regulations.

10 I think the answer shows it actually is
11 extraordinarily sweeping if we're suggesting that you might be
12 required to do a full set aside of a regulation because
13 regulations are different from statutes.

14 There's plenty of instances of remand without
15 vacatur, in which circuit courts -- DC Circuit, Fifth Circuit,
16 and so on and so forth -- have remanded to agencies for further
17 proceedings even after making a finding of unlawfulness.

18 So the sort of idea that you would be required by
19 a finding of unlawfulness to issue some sort of set aside
20 instead of a remand without vacatur can't be right and would
21 also mean that *Regents* itself was wrong.

22 *Regents* itself accepted a finding of unlawfulness
23 and nevertheless said that DHS had important following steps to
24 take.

25 So, again, I think that that sort of sweeping

1 argument that you are bound to do some sort of set aside is
2 certainly inconsistent with *Regents* and circuit case law and
3 with Your Honor's own PI opinion where you talked in
4 considerable detail about preliminary injunction and the pros
01:15PM 5 and cons specifically in the context of setting aside the memo.

6 It wasn't a statute before Your Honor at the PI
7 stage, and so I think that that's an important point to
8 remember.

9 The only other thing I wanted to note is that
01:15PM 10 plaintiff states have identified a whole range of options for
11 Your Honor to consider, how long to stay some sort of ruling,
12 what way to do slicing and dicing, and so on and so forth.

13 We don't disagree that any and all of that would
14 be considered, we just think it needs to be considered by DHS
01:16PM 15 on remand because we think that's going to bring in all of
16 those questions about reliance that *Regents* all but begged,
17 urged DHS to do in the first instance.

18 We don't think that dispossesses plaintiff states
19 of any right to relief or any effective remedy. It simply
01:16PM 20 suggests, as is normal and as *Regents* has asked for, that DHS
21 make the call in the first instance.

22 If it's taking too long, plaintiff states are
23 free to return to this Court for some sort of enforcement of
24 its prior remand to urge faster action from DHS.

01:16PM 25 And, of course, at the same time if DHS acts in

1 some way that plaintiff states believe is arbitrary and
2 capricious based on how they account for reliance interests,
3 then this Court is free to take action too.

4 So we're not suggesting that plaintiff states are
01:16PM 5 dispossessed of any opportunity or that this Court is prevented
6 effective relief or effective remedies. We're just talking
7 about DHS having the opportunity in the first instance because
8 we think that's exactly what *Regents* suggested is supposed to
9 happen after a finding of unlawfulness.

01:16PM 10 THE COURT: Well, if I do that, Mr. Feigenbaum, can't
11 DHS -- and this, again, is not rhetorical -- can't they just go
12 back and say, "Okay. We like the Napolitano memo. Let's put
13 it up for notice and comment"?

14 MR. FEIGENBAUM: So Your Honor has a whole range of
01:17PM 15 options. That's certainly an option that would be considered.
16 If Your Honor says, "This is unlawful because of a procedural
17 APA problem" and DHS upon remand wants to do notice and
18 comment, absolutely that's one of the options.

19 And so I do think that having a whole range of
01:17PM 20 options, but not vacating DACA in the meantime, is obviously
21 the best way to take into account reliance interests.

22 In Your Honor's example, a set aside of DACA
23 would, I think, create some chaos during the process of that
24 notice and comment rulemaking that you hypothesized because
01:17PM 25 individuals who remain removable but have associated collateral

1 benefits are going to be thrown into a real change of
2 circumstances while that proceeding is ongoing which is exactly
3 what remand without vacatur is meant to prevent and exactly
4 what *Regents* worked so hard to try to prevent in the way it
01:18PM 5 suggested that DHS go and make those policy calls about
6 reliance.

7 So I do think your hypothetical or your question
8 proves the point at the end of today that it makes sense not to
9 do an immediate set aside if one of the options on remand is
01:18PM 10 going to be the possibility for notice and comment rulemaking.
11 It would be much better to maintain the status quo, the status
12 quo that existed in part, as Your Honor noted, because of the
13 length of time it took for plaintiff states to bring this case.

14 And the number of individuals who are eligible
01:18PM 15 for DACA, who came forward and provided information to the
16 federal government in reliance on that, these are all reliance
17 interests that DHS needs to think about; that DHS, we
18 understand, is thinking about.

19 And this is an area where New Jersey and federal
01:18PM 20 defendants are in agreement. This is an area they're thinking
21 about.

22 THE COURT: Get that on the record. They've actually
23 agreed on something.

24 MR. FEIGENBAUM: It's possible. Bold, highlighted,
01:18PM 25 et cetera. So I do think we agree.

1 The last point is just that it's a long-standing
2 equitable principle, of course, that relief should not be
3 broader than is necessary to cure the harm.

4 The action this Court took in *Texas I* was when it
01:19PM 5 was facing 26 states where they were representing 50 percent of
6 the population and DAPA had not been implemented.

7 THE COURT: Well, I think the last point that you hit
8 on is quite frankly the most important because DAPA had not
9 been implemented and the government took the position that if I
01:19PM 10 didn't enjoin them, they were going to implement it, like the
11 next week and it would create reliance issues once it was
12 implemented. So this is a different situation completely.

13 MR. FEIGENBAUM: You said it better than I did, so I
14 won't bear repeating it.

01:19PM 15 THE COURT: All right.

16 MR. DISHER: Your Honor, may I briefly respond?

17 THE COURT: You may. You can have the last word.

18 MR. DISHER: Thank you.

19 On that last point about --

01:19PM 20 THE COURT: Oh, if that were only true. Go ahead,
21 Mr. Disher.

22 MR. DISHER: That would be nice. Maybe one day.

23 On that last point about reliance interest, one
24 thing to note on that is, of course, as we sit here today, DHS
01:20PM 25 and federal defendants are going to start and are, in fact,

1 starting to process initial DACA grants as well as the grants
2 of advance parole.

3 And as we pointed out in the reply, the eggs have
4 not been scrambled for those folks. The reliance interests
01:20PM 5 that they may claim is vastly less.

6 And to the idea of reliance more generally, that
7 is -- we're cognizant of that, but that is why we have offered
8 the Court a couple of different options about how to do this
9 taking into account those reliance interests.

01:20PM 10 But I will still maintain that the right option
11 is to not allow the program to remain on the books if it is in
12 fact unlawful. The instances in which there is remand without
13 vacatur, it normally arises in the context of an arbitrary or
14 capricious challenge. In other words, the agency has not
01:21PM 15 explained its reasoning well enough and so the Court is going
16 to leave the action on the books but allow the agency to have
17 another crack at trying to explain their rationale.

18 In this case, Your Honor, there is no rationale
19 that DHS or the federal defendants can provide that makes DACA
01:21PM 20 lawful. DACA is in excess of their statutory authority so it
21 is substantively unlawful and it was issued without notice and
22 comment rulemaking; so it is procedurally unlawful.

23 It's not as if we are complaining about the
24 reasoning and rationale that they gave in the first instance;
01:21PM 25 it's that they couldn't do this at all; and even if they could,

1 they did it the wrong way.

2 So there's no reason, if this Court finds that
3 DACA is unlawful, to let it remain on the books -- an unlawful
4 agency action on the books and yet remand it to the agency.

01:22PM

5 And any reliance interests that the New Jersey or
6 DACA intervenors bring up can be accounted for in that limited
7 stay of the effect of the Court's ruling as the DC Circuit
8 Court did.

01:22PM

9 And by the way, in the *Regents* case, of course,
10 that was an arbitrary and capricious challenge; but the Supreme
11 Court didn't remand it, didn't allow the decision to remain in
12 place to remand it to the agency to better explain their
13 reasoning. The DC Court set the 2017 memo aside completely and
14 that is what the Supreme Court affirmed, even in the arbitrary
15 and capricious challenge, which is the proper context
16 potentially for remand with vacatur.

01:22PM

17 We are not in an arbitrary and capricious
18 challenge. We are in a substantively and procedurally unlawful
19 context and therefore the proper remedy here in the first
20 instance is to set aside the program and then have the Court
21 use its powers of equity to enter some type of limited stay to
22 account for whatever reliance interests the Court deems
23 reasonable.

01:22PM

24 THE COURT: Thank y'all. I appreciate you coming here.

01:23PM

25 I apologize again for making some of you travel

1 in some cases great distances. But as I said, it was the
2 measured judgment of the Southern District -- it's why we're
3 not starting jury trials on January 2nd, 3rd, 4th, we're
4 waiting until the 19th because we're worried about COVID and
5 the holidays.

6 And so I'm sorry to make y'all do that. I
7 appreciate you coming. Y'all stay safe, and have a good
8 holiday.

9 COURTROOM SECURITY OFFICER: All rise.

10 (The proceedings were adjourned.)

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REPORTER'S CERTIFICATE

I, Lanie M. Smith, CSR, RMR, CRR, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ Lanie M. Smith
Official Court Reporter

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Exhibit 2

Nina Perales

From: Disher, Todd <Todd.Disher@oag.texas.gov>
Sent: Tuesday, June 26, 2018 7:20 PM
To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter
Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam
Subject: RE: Texas, et al. v. United States, et al. - Deposition of Joe Peters

Nina,

It's come to my attention that Mr. Peters has retired from the Texas Department of Public Safety. He is not a party to the case and cannot be compelled to testify by notice alone. If you serve Mr. Peters with a subpoena, please provide the required notice to the parties under Rule 30 of the time and place for compliance. Plaintiff States will move to quash the subpoena because his requested testimony does not meet the good-cause standard governing this expedited discovery period. Mr. Peters is not on Plaintiff States' witness list, and unlike Defendant-Intervenors' apparent intention to rely on 30 late-disclosed witnesses, Plaintiff States will rely on the sworn testimony of only timely disclosed witnesses in support of their motion for a preliminary injunction.

Todd

Todd Lawrence Disher
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Office of the Attorney General of Texas
P.O. Box 12548 (MC 001)
Austin, TX 78711-2548
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-----Original Message-----

From: Nina Perales [mailto:nperales@MALDEF.org]
Sent: Tuesday, June 26, 2018 3:36 PM
To: Ernest Herrera <eherrera@MALDEF.org>; Disher, Todd <Todd.Disher@oag.texas.gov>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov>; Rachel Wainer Apter <Rachel.Apter@njoag.gov>
Cc: Celina Moreno <cmoreno@MALDEF.org>; Kenneth Levine <Kenneth.Levine@law.njoag.gov>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Starr, Brantley <Brantley.Starr@oag.texas.gov>; Alejandra Avila <Aavila@MALDEF.org>; Denise M. Hulett <Dhulett@MALDEF.org>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Subject: RE: Texas, et al. v. United States, et al. - Deposition of Joe Peters

Todd:

Please see the attached AMENDED notice of deposition of Joe Peters (change in location). Thanks,

From: Ernest Herrera
Sent: Tuesday, June 26, 2018 12:03 PM
To: Disher, Todd; Nina Perales; Robins, Jeffrey (CIV); Rachel Wainer Apter
Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Todd:

Please see the attached notice of deposition of Joe Peters.

Ernest I. Herrera

Staff Attorney

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110 Broadway, Suite 300

San Antonio, TX 78205

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www.maldef.org<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.maldef.org_d=DwIF-g&c=Z_mC1sqOcfBCM1ZptXokOj7_ss37GsaAMzCZyvOxKN4&r=sJXj47LoI4xQ4zRIYXYPjtSABNiF6feJS5WOFi3VXKU&m=9MX88sodENEGF_YccZ8jDaQgXNDtFRSMY5WekjU0Sjo&s=MP5fcCfPnmS6dupTZY00imONdMHxpeSX9c0PXNOEP8E&e=>

From: Disher, Todd [mailto:Todd.Disher@oag.texas.gov]

Sent: Monday, June 25, 2018 9:38 PM

To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter

Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Nina,

Mr. Peters' calculations related to the potential cost from the influx of new license holders under the DAPA program. As I have already told you, Plaintiff States do not intend to rely on those calculations to support their motion for a preliminary injunction against DACA. We have provided deposition dates for you for all of the witnesses on our witness list and expert disclosures.

Also, your request overlooks your 30 untimely disclosed witnesses for whom you have failed to provide deposition dates. You still have not explained why you need to rely on that testimony, why they were not on your witness list, or why you did not provide dates for their depositions.

Todd

Todd Lawrence Disher

Special Counsel for Civil Litigation

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Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>

From: Nina Perales [mailto:nperales@MALDEF.org]

Sent: Monday, June 25, 2018 2:37 PM

To: Disher, Todd <Todd.Disher@oag.texas.gov>; Ernest Herrera <eherrera@MALDEF.org>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov>; Rachel Wainer Apter <Rachel.Apter@njoag.gov>

Cc: Celina Moreno <cmoreno@MALDEF.org>; Kenneth Levine <Kenneth.Levine@law.njoag.gov>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>; Starr, Brantley <Brantley.Starr@oag.texas.gov>; Alejandra Avila <Aavila@MALDEF.org>; Denise M. Hulett <Dhulett@MALDEF.org>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov>; Bitter, Adam <Adam.Bitter@oag.texas.gov>
Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Dear Todd,

In light of Plaintiffs' position declining to withdraw declarations from non-disclosed witnesses that are included in your preliminary injunction submission, Defendant Intervenor's would like to take the deposition of Mr. Joe Peters. We can take his deposition in Austin at your location of choice anytime Wed. through Friday this week that is not during the depositions of Dr. Deere or Dr. Potter. In other words, we are available at any time other than:

Wednesday - 1pm - 6pm
Thursday - 10am-3pm

Thank you very much,

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
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From: Nina Perales
Sent: Friday, June 22, 2018 5:30 PM
To: 'Disher, Todd'; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter
Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam
Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

I understand and appreciate your communication on this -- and your willingness to find a solution -- even if we are ultimately unsuccessful.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
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San Antonio, TX 78205
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From: Disher, Todd [mailto:Todd.Disher@oag.texas.gov]
Sent: Friday, June 22, 2018 5:27 PM
To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter

Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam
Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Thanks, Nina. We are not interested in trying to withdraw portions of an exhibit already on file with the Court, but we will make our intentions clear.

Todd

Todd Lawrence Disher
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From: Nina Perales [mailto:nperales@MALDEF.org]
Sent: Friday, June 22, 2018 5:04 PM
To: Disher, Todd <Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>>; Ernest Herrera <eherrera@MALDEF.org<mailto:eherrera@MALDEF.org>>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov<mailto:Jeffrey.Robins@usdoj.gov>>; Rachel Wainer Apter <Rachel.Apter@njoag.gov<mailto:Rachel.Apter@njoag.gov>>
Cc: Celina Moreno <cmoreno@MALDEF.org<mailto:cmoreno@MALDEF.org>>; Kenneth Levine <Kenneth.Levine@law.njoag.gov<mailto:Kenneth.Levine@law.njoag.gov>>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov<mailto:Jeremy.Hollander@law.njoag.gov>>; Biggs, Adam <Adam.Biggs@oag.texas.gov<mailto:Adam.Biggs@oag.texas.gov>>; Starr, Brantley <Brantley.Starr@oag.texas.gov<mailto:Brantley.Starr@oag.texas.gov>>; Alejandra Avila <Aavila@MALDEF.org<mailto:Aavila@MALDEF.org>>; Denise M. Hulett <Dhulett@MALDEF.org<mailto:Dhulett@MALDEF.org>>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov<mailto:Trent.Peroyea@oag.texas.gov>>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov<mailto:Cristina.Moreno@oag.texas.gov>>; Bitter, Adam <Adam.Bitter@oag.texas.gov<mailto:Adam.Bitter@oag.texas.gov>>
Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Todd,

Although we can leave these materials in the record and pledge not to "rely" on them for the PI, they are still in the record and I don't think our intentions will be clear to the court. My suggestion is that Plaintiffs withdraw the eleven non-witness declarations from wherever they appear in the record, and Defendant Intervenor's will agree not to file with the court the non-witness declarations that you are concerned about.

Nina Perales
Vice President of Litigation
Mexican American Legal Defense
and Educational Fund, Inc. (MALDEF)
110 Broadway, Suite 300
San Antonio, TX 78205
Ph (210) 224-5476 ext. 206
FAX (210) 224-5382

From: Disher, Todd [mailto:Todd.Disher@oag.texas.gov]
Sent: Friday, June 22, 2018 4:53 PM
To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter
Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam
Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Nina,

So do you agree that MALDEF will rely on sworn testimony only from timely disclosed witnesses if Plaintiff States agree to the same?

Todd

Todd Lawrence Disher
Special Counsel for Civil Litigation
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P.O. Box 12548 (MC 001)
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(512) 936-2266
Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>

From: Nina Perales [mailto:nperales@MALDEF.org]
Sent: Friday, June 22, 2018 2:51 PM
To: Disher, Todd <Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>>; Ernest Herrera <eherrera@MALDEF.org<mailto:eherrera@MALDEF.org>>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov<mailto:Jeffrey.Robins@usdoj.gov>>; Rachel Wainer Apter <Rachel.Apter@njoag.gov<mailto:Rachel.Apter@njoag.gov>>
Cc: Celina Moreno <cmoreno@MALDEF.org<mailto:cmoreno@MALDEF.org>>; Kenneth Levine <Kenneth.Levine@law.njoag.gov<mailto:Kenneth.Levine@law.njoag.gov>>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov<mailto:Jeremy.Hollander@law.njoag.gov>>; Biggs, Adam <Adam.Biggs@oag.texas.gov<mailto:Adam.Biggs@oag.texas.gov>>; Starr, Brantley <Brantley.Starr@oag.texas.gov<mailto:Brantley.Starr@oag.texas.gov>>; Alejandra Avila <Aavila@MALDEF.org<mailto:Aavila@MALDEF.org>>; Denise M. Hulett <Dhulett@MALDEF.org<mailto:Dhulett@MALDEF.org>>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov<mailto:Trent.Peroyea@oag.texas.gov>>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov<mailto:Cristina.Moreno@oag.texas.gov>>; Bitter, Adam <Adam.Bitter@oag.texas.gov<mailto:Adam.Bitter@oag.texas.gov>>
Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Todd,

If you file a motion, please note in your certificate of conference that Defendant Intervenor's oppose the motion unless Plaintiffs withdraw similar sworn testimony by non-disclosed witnesses that Plaintiffs filed with the court with their Motion for Preliminary Injunction.

Nina Perales

Vice President of Litigation

Mexican American Legal Defense

and Educational Fund, Inc. (MALDEF)

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San Antonio, TX 78205

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FAX (210) 224-5382

-----Original Message-----

From: Disher, Todd [mailto:Todd.Disher@oag.texas.gov]

Sent: Friday, June 22, 2018 2:44 PM

To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter

Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenors' Exhibits

Nina,

The 11 declarations you reference below are included as part of another exhibit already on file with the Court. Once again, we do not intend to rely on those declarations in support of our motion for preliminary injunction. You have seen our initial briefing included with our motion and know that to be true. We will work with you to schedule depositions should that change.

In contrast, we still do not know why or how you intend to rely on the two dozen additional declarations on your exhibit list and why those witnesses were not included on your witness list. Even now, you still have not offered to withdraw those declarations as part of any agreement we may reach. Given the impending end of the discovery period that you requested, we do not have time to conduct additional negotiations based on your statement that you would consider withdrawing the untimely declarations. We will note your opposition in our motion.

Todd

Todd Lawrence Disher

Special Counsel for Civil Litigation

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Austin, TX 78711-2548

(512) 936-2266

Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>

-----Original Message-----

From: Nina Perales [mailto:nperales@MALDEF.org]

Sent: Friday, June 22, 2018 10:30 AM

To: Disher, Todd <Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>>; Ernest Herrera <eherrera@MALDEF.org<mailto:eherrera@MALDEF.org>>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov<mailto:Jeffrey.Robins@usdoj.gov>>; Rachel Wainer Apter <Rachel.Apter@njoag.gov<mailto:Rachel.Apter@njoag.gov>>

Cc: Celina Moreno <cmoreno@MALDEF.org<mailto:cmoreno@MALDEF.org>>; Kenneth Levine <Kenneth.Levine@law.njoag.gov<mailto:Kenneth.Levine@law.njoag.gov>>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov<mailto:Jeremy.Hollander@law.njoag.gov>>; Biggs, Adam <Adam.Biggs@oag.texas.gov<mailto:Adam.Biggs@oag.texas.gov>>; Starr, Brantley <Brantley.Starr@oag.texas.gov<mailto:Brantley.Starr@oag.texas.gov>>; Alejandra Avila <Aavila@MALDEF.org<mailto:Aavila@MALDEF.org>>; Denise M. Hulett <Dhulett@MALDEF.org<mailto:Dhulett@MALDEF.org>>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov<mailto:Trent.Peroyea@oag.texas.gov>>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov<mailto:Cristina.Moreno@oag.texas.gov>>; Bitter, Adam <Adam.Bitter@oag.texas.gov<mailto:Adam.Bitter@oag.texas.gov>>

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenors' Exhibits

Todd,

Thank you for your email. Are you willing to withdraw the sworn testimony of non-witnesses that you have placed in the record (the eleven listed below)? If so, we would consider withdrawing the Def-Int declarations you identified as associated with non-disclosed witnesses.

Nina Perales

Vice President of Litigation

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-----Original Message-----

From: Disher, Todd [mailto:Todd.Disher@oag.texas.gov]

Sent: Friday, June 22, 2018 9:21 AM

To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter

Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenors' Exhibits

Nina,

We are not interested in a deal that does less than withdraw all of your declarations and deposition testimony from other cases. You have seen our arguments and know which declarations we used to support our motion for preliminary injunction. We still have not seen your fully briefed position, and you still have not explained why you need to rely on testimony from other witnesses in other cases.

Todd

Todd Lawrence Disher

Special Counsel for Civil Litigation

Office of the Attorney General of Texas

P.O. Box 12548 (MC 001)

Austin, TX 78711-2548

(512) 936-2266

Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>

-----Original Message-----

From: Nina Perales [mailto:nperales@MALDEF.org]

Sent: Thursday, June 21, 2018 6:36 PM

To: Disher, Todd <Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>>; Ernest Herrera <eherrera@MALDEF.org<mailto:eherrera@MALDEF.org>>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov<mailto:Jeffrey.Robins@usdoj.gov>>; Rachel Wainer Apter <Rachel.Apter@njoag.gov<mailto:Rachel.Apter@njoag.gov>>

Cc: Celina Moreno <cmoreno@MALDEF.org<mailto:cmoreno@MALDEF.org>>; Kenneth Levine <Kenneth.Levine@law.njoag.gov<mailto:Kenneth.Levine@law.njoag.gov>>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov<mailto:Jeremy.Hollander@law.njoag.gov>>; Biggs, Adam <Adam.Biggs@oag.texas.gov<mailto:Adam.Biggs@oag.texas.gov>>; Starr, Brantley <Brantley.Starr@oag.texas.gov<mailto:Brantley.Starr@oag.texas.gov>>; Alejandra Avila <Aavila@MALDEF.org<mailto:Aavila@MALDEF.org>>; Denise M. Hulett <Dhulett@MALDEF.org<mailto:Dhulett@MALDEF.org>>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov<mailto:Trent.Peroyea@oag.texas.gov>>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov<mailto:Cristina.Moreno@oag.texas.gov>>; Bitter, Adam <Adam.Bitter@oag.texas.gov<mailto:Adam.Bitter@oag.texas.gov>>

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenors' Exhibits

Dear Todd,

We would oppose a motion to strike our exhibits without a similar withdrawal by Texas of the sworn testimony filed with your motion for preliminary injunction of the following non-disclosed witnesses:

1. Richard Allgeyer
2. Kevin D. Bailey
3. Lisa Dawn-Fisher
4. Karl Eschbach
5. Patrick A. Fernan
6. Jeffrey M. Gill
7. Joe Peters
8. Sheri Pollock
9. Donald M. Snemis
10. Finis Welch
11. David G. Baker

My suggestion is that we discuss the possibility of Defendant Intervenors withdrawing some of the exhibits that have caused you concern along with Texas withdrawing some of the exhibits that have caused us concern. We are willing to have this discussion with you at your convenience.

Nina Perales

Vice President of Litigation

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FAX (210) 224-5382

-----Original Message-----

From: Disher, Todd [mailto:Todd.Disher@oag.texas.gov]

Sent: Wednesday, June 20, 2018 4:31 PM

To: Nina Perales; Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter

Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Nina,

As we have told you on the phone, at this time we are not planning on relying on any declarations in support of our motion for preliminary injunction other than those from the witnesses on our witness list and the experts we have disclosed. If that changes, we will let you know and make any additional witnesses available to be deposed.

It is still not clear why you intend to rely on two dozen declarations from other proceedings in other jurisdictions. It is also not clear why you did not include these witnesses on your witness list that the parties agreed to exchange on June 8 or on your expert disclosures due by court order on June 15. We are going to move to strike those declarations. Please let me know if you oppose that motion.

Todd

Todd Lawrence Disher

Special Counsel for Civil Litigation

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Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>

-----Original Message-----

From: Nina Perales [mailto:nperales@MALDEF.org]

Sent: Monday, June 18, 2018 1:15 PM

To: Disher, Todd <Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>>; Ernest Herrera <eherrera@MALDEF.org<mailto:eherrera@MALDEF.org>>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov<mailto:Jeffrey.Robins@usdoj.gov>>; Rachel Wainer Apter <Rachel.Apter@njoag.gov<mailto:Rachel.Apter@njoag.gov>>

Cc: Celina Moreno <cmoreno@MALDEF.org<mailto:cmoreno@MALDEF.org>>; Kenneth Levine <Kenneth.Levine@law.njoag.gov<mailto:Kenneth.Levine@law.njoag.gov>>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov<mailto:Jeremy.Hollander@law.njoag.gov>>; Biggs, Adam <Adam.Biggs@oag.texas.gov<mailto:Adam.Biggs@oag.texas.gov>>; Starr, Brantley <Brantley.Starr@oag.texas.gov<mailto:Brantley.Starr@oag.texas.gov>>; Alejandra Avila <Aavila@MALDEF.org<mailto:Aavila@MALDEF.org>>; Denise M. Hulett <Dhulett@MALDEF.org<mailto:Dhulett@MALDEF.org>>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov<mailto:Trent.Peroyea@oag.texas.gov>>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov<mailto:Cristina.Moreno@oag.texas.gov>>; Bitter, Adam <Adam.Bitter@oag.texas.gov<mailto:Adam.Bitter@oag.texas.gov>>

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenor's Exhibits

Todd,

Thank you for writing to share your concern. As I expressed in earlier phone calls, Defendant Intervenor's share that same concern with a number of witnesses whose declarations Plaintiffs have filed with the court in support of their motion for preliminary injunction.

In total, Plaintiffs have filed with the court, but not disclosed as witnesses, the declarations of 11 individuals:

1. Richard Allgeyer
2. Kevin D. Bailey
3. Lisa Dawn-Fisher
4. Karl Eschbach
5. Patrick A. Fernan
6. Jeffrey M. Gill

7. Jose Peters
8. Sheri Pollock
9. Donald M. Snemis
10. Finis Welch
11. David G. Baker

I think it makes sense to discuss all of these declarations at the same time and try to figure out if we want to take these depositions or come to some other agreement.

Thank you very much,

From: Disher, Todd [Todd.Disher@oag.texas.gov]

Sent: Sunday, June 17, 2018 11:59 AM

To: Ernest Herrera; Robins, Jeffrey (CIV); Rachel Wainer Apter

Cc: Celina Moreno; Kenneth Levine; Jeremy Hollander; Biggs, Adam; Starr, Brantley; Alejandra Avila; Denise M. Hulett; Peroyea, Trent; Moreno, Cristina; Bitter, Adam; Nina Perales

Subject: RE: Texas, et al. v. United States, et al. - Defendant Intervenors' Exhibits

Nina,

I write with a concern regarding your exhibit list. With 14 days left in the discovery period, you have now included sworn statements from 25 new witnesses not on your witness list. The parties agreed to disclose by June 8 the identities of all witnesses from whom they were going to rely on sworn statements. These new witnesses provided sworn testimony in different proceedings in different jurisdictions. Please let me know why you intend to rely on this testimony and why these witnesses were not included on your witness list pursuant to our agreement.

Todd

Todd Lawrence Disher

Special Counsel for Civil Litigation

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From: Ernest Herrera [mailto:eherrera@MALDEF.org]

Sent: Saturday, June 16, 2018 12:23 AM

To: Disher, Todd <Todd.Disher@oag.texas.gov<mailto:Todd.Disher@oag.texas.gov>>>; Robins, Jeffrey (CIV) <Jeffrey.Robins@usdoj.gov<mailto:Jeffrey.Robins@usdoj.gov>>>; Rachel Wainer Apter <Rachel.Apter@njoag.gov<mailto:Rachel.Apter@njoag.gov>>>

Cc: Celina Moreno <cmoreno@MALDEF.org<mailto:cmoreno@MALDEF.org>>>; Kenneth Levine <Kenneth.Levine@law.njoag.gov<mailto:Kenneth.Levine@law.njoag.gov>>>; Jeremy Hollander <Jeremy.Hollander@law.njoag.gov<mailto:Jeremy.Hollander@law.njoag.gov>>>; Biggs, Adam <Adam.Biggs@oag.texas.gov<mailto:Adam.Biggs@oag.texas.gov>>>; Starr, Brantley <Brantley.Starr@oag.texas.gov<mailto:Brantley.Starr@oag.texas.gov>>>; Alejandra Avila <Aavila@MALDEF.org<mailto:Aavila@MALDEF.org>>>; Denise M. Hulett <Dhulett@MALDEF.org<mailto:Dhulett@MALDEF.org>>>; Peroyea, Trent <Trent.Peroyea@oag.texas.gov<mailto:Trent.Peroyea@oag.texas.gov>>>; Moreno, Cristina <Cristina.Moreno@oag.texas.gov<mailto:Cristina.Moreno@oag.texas.gov>>>; Bitter, Adam

Fi3VXKU&m=167RZM2-lQjk1ToZrR0F3q6kgMzhzwbibFz2JCXgJ78&s=TGggjuHtckOnZBS8UQ5nUrkgadwE7-
Jd1jQCnngm4AQ&e=>=>

Exhibit 3

551 Fed.Appx. 749

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

WARRIOR ENERGY SERVICES CORPORATION; Fastorq, L.L.C.; Stabil Drill Specialties, L.L.C.; Workstrings International, L.L.C.; Superior Energy Services, L.L.C., doing business as Superior Completion Services, Plaintiffs–Appellants

v.

ATP TITAN M/V, its equipment, appurtenances, furniture, etc., in rem; ATP Titan, L.L.C., in personam, Defendants–Appellees.

No. 13–30587

|

Summary Calendar, No. 13–30587

|

Jan. 6, 2014.

Synopsis

Background: Tools and services supplier brought action against floating oil and gas production facility and its owners, seeking declaratory judgment that facility was a vessel and that supplier's maritime liens against the facility were valid. The United States District Court for the Eastern District of Louisiana, Sarah S. Vance, J., 941 F.Supp.2d 699, dismissed. Supplier appealed.

Holdings: The Court of Appeals held that:

the District Court did not abuse its discretion in denying supplier's motion to file a surreply, and

facility was not a vessel for purposes of the Maritime Lien Act.

Affirmed.

Attorneys and Law Firms

*750 Stewart F. Peck, Donald Lance Cardwell, Benjamin W. Kadden, David Boies Sharpe, Lugenbuhl, Wheaton, Peck, Rankin & Hubbard, New Orleans, LA, for Plaintiffs–Appellants.

Paul Joseph Goodwine, Emile Joseph Dreuil, III, Esq., Taylor Paul Mouledoux, Slattery, Marino & Roberts, P.L.C., New Orleans, LA, for Defendants–Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:12–CV–2297.

Before WIENER, OWEN, and HAYNES, Circuit Judges.

Opinion

PER CURIAM:*

Warrior Energy Services Corporation, Fastorq, L.L.C., Stabil Drill Specialties, L.L.C., Workstrings International, L.L.C., and Superior Energy Services, L.L.C., d/b/a Superior Completion Services (collectively, “Superior”) appeal the order of the district court dismissing their claims against ATP Titan M/V (the “TITAN”) and ATP Titan, L.L.C. (“ATP”). We AFFIRM.

I. Background

The TITAN is a floating oil and gas production facility moored on the Outer Continental Shelf, miles offshore of Louisiana. The TITAN is owned by ATP and is operated by ATP Oil & Gas. Superior contracted with ATP Oil & Gas to provide certain services and supplies to the TITAN to support its operations. After Superior performed under the contract, ATP Oil & Gas declared bankruptcy, and Superior was not paid.

Superior filed suit, asserting maritime liens and, in the alternative, state law privileges against the TITAN.¹ Superior *751 also sought declaratory relief against both the TITAN and ATP. ATP and the TITAN moved to dismiss, asserting that the district court lacked *in rem* admiralty jurisdiction over the TITAN and that Superior had failed to state a claim against

2014 A.M.C. 2514

ATP. After jurisdictional discovery, the district court granted the motion and Superior appealed.²

II. Standard of Review

We review a district court's dismissal for lack of subject matter jurisdiction *de novo*. See *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir.2012). The burden of proof lies with the party asserting jurisdiction, who must prove “by a preponderance of the evidence that the court has jurisdiction based on the complaint and evidence.” *Id.* A court can find a lack of subject matter jurisdiction based on “(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001).³

We review a district court's dismissal for failure to state a claim *de novo*, “accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff.” *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir.2010). Dismissal is appropriate where the plaintiff fails to allege “enough facts to state a claim to relief that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and thus does not “raise a right to relief above the speculative level,” *id.* at 555, 127 S.Ct. 1955. This standard is met where a plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

III. Discussion

Superior seeks to enforce a maritime lien against the TITAN pursuant to the Maritime Lien Act, 46 U.S.C. §§ 31301, *et seq.*, which states that “a person providing necessities to a vessel ... has a maritime lien on the vessel [and] may bring a civil action *in rem* to enforce the lien.” 46 U.S.C. § 31342(a) (emphasis added). Federal jurisdiction under the Maritime Lien Act therefore turns in this case on whether the TITAN is a “vessel.” See *Lozman*, 133 S.Ct. at 745 (“A court's jurisdiction, e.g., admiralty jurisdiction, may turn on application of the term ‘vessel.’”).

A vessel is defined as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. § 3. *752 This includes “any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment.” *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497, 125 S.Ct. 1118, 160 L.Ed.2d 932 (2005). The dispositive question is “whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one.” *Id.* at 496, 125 S.Ct. 1118 (internal quotation marks omitted).

We conclude that the district court did not err in concluding as a matter of law that the TITAN does not constitute a vessel based upon our prior precedent addressing similar structures. First, the TITAN is moored to the floor of the Outer Continental Shelf by twelve chain mooring lines connected to twelve anchor piles, each weighing 170 tons and each embedded over 200 feet into the seafloor, and by an oil and gas production infrastructure. See *Stewart*, 543 U.S. at 494, 125 S.Ct. 1118 (“[A] watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.”) (internal quotations omitted); see also *Mendez v. Anadarko Petroleum Corp.*, 466 Fed.Appx. 316, 317 (5th Cir.2012) (unpublished) (concluding that similarly moored spar was not a vessel),⁴ *cert. denied*, — U.S. —, 133 S.Ct. 979, 184 L.Ed.2d 760 (2013); *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 355 (5th Cir.1999) (same). Second, the TITAN has not been moved since it was constructed and installed at its current location in 2010. See *Lozman*, 133 S.Ct. at 741 (concluding that houseboat that had been moved only four times in seven years was not a vessel); see also *Mendez*, 466 Fed.Appx. at 317 (finding that spar that had been moored in one location for nine years was not a vessel). Third, the TITAN has no means of self-propulsion, apart from repositioning itself within a 200-foot range by manipulating its mooring lines. See *Fields*, 182 F.3d at 355, 359 (concluding that spar that had no means of self-propulsion, but could reposition itself within a 250-foot range by manipulating its mooring lines, had “extremely limited and purely incidental mobility” and was not a vessel). Fourth, moving the TITAN would require approximately twelve months of preparation, at least fifteen weeks for its execution, and would cost between \$70 and \$80 million. See *Mendez*, 466 Fed.Appx. at 319 (concluding that spar was not a vessel where relocating it would take nearly two months and would cost \$42 million); *Moore v. Bis Salamis, Inc.*, 748

2014 A.M.C. 2514

F.Supp.2d 598, 606 (E.D.Tex.2010) (same). In light of these characteristics, we agree with the district court that the TITAN is not practically capable of transportation on water and is therefore, as a matter of law, not a vessel.⁵ See *Stewart*, 543 U.S. at 497, 125 S.Ct. 1118.

*753 Finally, Superior sought a declaratory judgment that the TITAN is a vessel and that Superior has valid maritime liens against the TITAN. Because we conclude that the

TITAN is not a vessel, Superior has failed to state a claim for declaratory relief.

AFFIRMED.

All Citations

551 Fed.Appx. 749, 2014 A.M.C. 2514

Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.
- 1 The only jurisdictional basis asserted for the state law claims was supplemental jurisdiction under 28 U.S.C. § 1367; Superior does not argue that the district court had original jurisdiction over the state law claims against the TITAN. With respect to its claims against ATP, Superior conceded in the district court that those claims relied upon TITAN's status as a vessel. Thus, if TITAN is not a vessel, Superior conceded that it does not have a claim against ATP. Before our court, it does not argue any basis for liability against TITAN or ATP that does not turn on the classification of the TITAN as a vessel or not.
- 2 Superior argues that the district court erred in denying its motion for leave to file a sur-reply because ATP and the TITAN raised new arguments in their reply addressing a recently decided case, *Lozman v. City of Riviera Beach, Florida*, — U.S. —, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013). However, “[s]urreplies are heavily disfavored by courts.” *Weems v. Hodnett*, No. 10–CV–1452, 2011 WL 2731263, at *1 (W.D.La. July 13, 2011). The district court did not abuse its discretion in denying Superior leave to file a sur-reply, especially as Superior had previously addressed *Lozman* in its memorandum in opposition.
- 3 We reject Superior's invitation to assume hypothetical jurisdiction in order to reach the merits. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).
- 4 Superior contends that the district court erred in relying on the unpublished opinion in *Mendez*. While *Mendez* is not “controlling precedent,” it “may be [cited as] persuasive authority.” *Ballard v. Burton*, 444 F.3d 391, 401 n. 7 (5th Cir.2006). Given the factual similarities between this case and *Mendez*, we agree with the district court that *Mendez* is persuasive.
- 5 In *Lozman*, the Supreme Court articulated a standard to be applied in “borderline cases where ‘capacity’ to transport over water is in doubt.” 133 S.Ct. at 745. This is not a “borderline case.” Application of the *Lozman* “reasonable observer” test would nonetheless lead to the same result, as, for the reasons already enumerated, no reasonable observer, looking to the TITAN's physical characteristics and activities, would consider it designed to a practical degree for water transportation. See *id.* at 741.

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Exhibit 4

2011 WL 2731263

Only the Westlaw citation is currently available.

United States District Court,
 W.D. Louisiana,
 Shreveport Division.

Tanya McLain WEEMS

v.

James David HODNETT, et al.

No. 10–CV–1452.

I

July 13, 2011.

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MEMORANDUM ORDER

MARK L. HORNSBY, United States Magistrate Judge.

*1 Before the court is Plaintiff's Motion for Leave to
 File Surreply. Doc. 38. Surreplies are heavily disfavored
 by courts. *See, e.g., Sosna v. Bank of America*, 2011 WL
 1060966 (D.Kan.2011); *Tate v. Mail Contractors*, 2011
 WL 1380016 (W.D.N.C.2011); *Glass v. Lahood*, 2011
 WL 1930669 (D.D.C.2011); *Sims v. Paramount Gold and
 Silver Corp.*, 2010 WL 5364783 (D.Ariz.2010); *El Chico
 Restaurants v. Carroll*, 2010 WL 2697293 (N.D.Tex.2010);
Aslani v. Sparrow Health Systems, 2009 WL 3711602
 (W.D.Mich.2009); *Crane v. Memorial Hospital*, 2009 WL
 742567 (D.Utah 2009).

This court's experience, shared by others in reported
 decisions, is that surreplies often amount to little more
 than a strategic effort by the nonmovant to have the
 last word on a matter. *See, e.g., In re Enron*, 465
 F.Supp.2d 687 (S.D.Tex.2006); *Lacher v. West*, 147 F.Supp.2d
 538 (N.D.Tex.2001). The fourth brief usually just repeats

arguments from the memorandum in opposition and
 serves only to delay resolution of the underlying motion.
 Accordingly, it is proper to deny a motion for leave to file
 a surreply where the party fails to demonstrate exceptional
 or extraordinary circumstances warranting the relief sought.
Starr v. Cox, 2008 WL 1914286 (D.N.H.2008); *Lacher*, 147
 F.Supp.2d at 539–40. In other words, in seeking leave to
 file a surreply brief, a party must identify the new issues,
 theories, or arguments which the movant raised for the first
 time in its reply brief. *Harwood v. U.S.*, 2009 WL 2215080
 (S.D.W.Va.2009).

That should not happen often, because it is improper for
 the movant to sandbag and raise wholly new issues in a
 reply memorandum. The scope of the reply should be limited
 to addressing the arguments raised by the memorandum in
 opposition. *Petty v. Portofino Council of Coowners, Inc.*, 702
 F.Supp.2d 721, 729 n. 3 (S.D.Tex.2010). “[A]rguments raised
 for the first time in a Reply brief are waived.” *Jones v. Cain*,
 600 F.3d 527, 541 (5th Cir.2010), quoting *Iteld, Bernstein &
 Assocs., LLC v. Hanover Ins. Group*, 2009 WL 2496552, *4
 (E.D.La.2009).

Plaintiff's motion for leave sets forth no justification for
 filing the surreply, other than to note that when he filed the
 surreply (which was improperly contained within another
 memorandum), the clerk issued a Notice of Deficiency. That
 does not articulate the type of exceptional or extraordinary
 circumstances, that happen perhaps only a few times in a
 lawyer's career, that most courts require to allow the filing of
 a surreply. Accordingly, Plaintiff's Motion for Leave to File
 Surreply (Doc. 38) is denied.

A surreply was virtually unheard of in this division for
 many years. Leave to file one was requested no more than a
 couple of times each year, and then usually in extraordinarily
 complex litigation. In the past two years or so, however, there
 has been an explosion of requests to file surreplies, usually in
 a most ordinary case and where there is no real need to file a
 fourth brief, only a desire except to have the last word. Some
 lawyers appear to believe that surreplies are common and
 almost expected, but that is certainly not the case. Local Rules
 7.4 and 7.5 govern the briefing of motions, and they do not
 even provide for the filing of a reply brief. Accordingly, some
 judges do not allow a reply brief to be filed without leave
 of court, and requests for leave are frequently denied. Other
 judges, including the undersigned, provide in the Notice of
 Motion Setting that a movant may file a reply without leave
 of court. (The mounting requests to file surreplies may lead

to reconsideration of that policy.) No rule or notice employed in this division permits the filing of a surreply.

*2 The trend has reached the point that some “must have the last word” lawyers have even sought leave to file a *fifth* brief (the name for which has not yet been settled upon by the bar) to respond to a surreply. This must stop. The undersigned will no longer grant leave to file a surreply unless the requesting

party points out the wholly new issues in the reply that demand a response or otherwise articulates exceptional or extraordinary circumstances.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2731263

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Exhibit 5

2023 WL 2825702

Only the Westlaw citation is currently available.

United States District Court, S.D. Texas.

Carlo Giuseppe CIVELLI, et al., Plaintiffs,

v.

J.P. MORGAN CHASE
SECURITIES, LLC, et al., Defendants.

Civil Action H-173739

|

Signed February 2, 2023

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Kyle Robert Watson, Winstead PC, The Woodlands, TX, for Defendants Dossey & Jones, PLLC, James Dossey.

Order on Motion to Compel, Motion for Leave

Lynn N. Hughes, United States District Judge

*1 The Mulacek Defendants have filed an emergency motion to compel compliance with the Court's computer forensic protocol. In opposing this motion, the Civelli

Plaintiffs have requested leave to file a sur-reply to the Mulacek Defendants' reply.

1. Leave to File Sur-Reply

While the Federal Rules of Civil Procedure and this Court's Local Rules do not expressly prohibit sur-replies, they are heavily disfavored.¹ Whether to allow a sur-reply is within the discretion of the district court, and is appropriate "only when the movant raises new legal theories or attempts to present new evidence at the reply stage."² Leave is to be denied where the proposed sur-reply merely restates arguments in the movant's response and appears to be only a "strategic effort ... to have the last word on the matter."³

The Mulacek Defendants' reply did not raise new legal contentions. It was a continuation of the parties' dispute over the scope of the forensic protocol and addressed the arguments made in the Civelli Plaintiffs' response. In consideration of the present dispute, even if the reply raised some consideration that was not in the response, it cannot be said to fall outside the scope of the legal arguments at issue in the response. The sur reply is denied.

2. Forensic Protocol

The parties dispute whether the results of the forensic process, namely the results of a search of the unallocated space, would be delivered to both parties. While the Civelli Plaintiffs argue that nothing requires a review for privilege before they obtain access to the results, such an interpretation would contravene the text and purpose of the protocol.

The Civelli Plaintiffs have offered unconvincing support for their proposition that the parties agreed to give them information that may be privileged, before any review by the Mulacek Defendants. While perhaps the Mulacek Defendants may have been mistaken in having believed that the January Code Production would be undecipherable, such mistake is no reason to contravene the letter and spirit of the protocol, which explicitly affords relevant search results first to the Mulacek Defendants for a review of privilege.⁴ The Civelli Plaintiffs would have the Court accept that the Mulacek Defendants knowingly consented to blanket access, even to privileged information. This argument is ambitious but without support, and is denied. The Civelli Plaintiffs must delete the January Code Production and permit the Mulacek Defendants to first conduct a proper review of the data.

3. Adequacy of the Privilege Assertion

The Federal Rules instruct that when a party withholds otherwise discoverable information on the basis of privilege, the party must expressly make the claim and describe the nature of the discovery in a manner that will enable other parties to assess the claim, including the basis for it.⁵

*2 As the Mulacek Defendants have pointed out, they informed the Civelli Plaintiffs that the privileged communication is one “between counsel and our clients that is providing legal advice.”⁶ This description, however, is too generic. Moving forward, after conducting a confidentiality review, the Mulacek Defendants may withhold confidential information but must sufficiently describe the nature of that information. At that time, the Civelli Plaintiffs, if still unsatisfied with the assertion of privilege, “may promptly present the information to the court under seal for a determination of the claim.”⁷

4. Data Carving vs. Underlying Data

In rejecting the Civelli Plaintiffs’ sur-reply, the Court will clarify and resolve a contention in the sur-reply, to which the Mulacek Defendants responded, because its resolution is necessary in this discovery dispute. The dispute concerns whether the Civelli Plaintiffs, privilege aside, may review the code from the allocated space on the basis that data carving is insufficient; they claim that they must examine the data itself, since data carving may not necessarily show a fragment of a different version or draft of the Letter of Wishes.

The Mulacek Defendants oppose this search on the basis that the protocol is limited to “reasonably accessible documents” and does not allow for the fragments of text in computer code. They also argue that review of the code “would add hundreds -

if not thousands – of hours to the Letter of Wishes discovery,” and would confuse a jury.⁸

Without getting into whether the fragments are “reasonably accessible,” the Court agrees that a raw review of the data itself would impose a disproportionate amount of discovery. The Civelli Plaintiffs accuse the Civelli Defendants of nefarious play, an allegation that is thus far wholly unsubstantiated. The Mulacek Defendants and the Court have indulged what may well be a wild goose chase, and the data carving affords the Civelli Plaintiffs ample opportunity to discover foul play. To drastically expand discovery on this issue and prolong what has already been an extremely lengthy litigation, at great cost to the parties, on the grounds that a review of the code itself might possibly uncover something that the data carving missed, is too much. In considering the [Rule 26\(b\) \(1\)](#) factors, the Court concludes that the Letter of Wishes discovery does not extend to the review of the computer code itself.

5. Conclusion

In sum, the Mulacek Defendants’ motion to compel is granted, and the Civelli Plaintiffs’ request for leave to file a sur-reply is denied. The Civelli Plaintiffs must delete the January Code Production and permit the Mulacek Defendants to first conduct a proper review of the data, at which time the Mulacek Defendants must adequately describe the nature of any privilege assertions so that the Civelli plaintiffs can assess the claim. The review of the discovery at issue extends only to the carved documents, and not to the computer code itself. (750) (760)

All Citations

Slip Copy, 2023 WL 2825702

Footnotes

- 1 [Warrior Energy Servs. Corp. v. ATP Titan M/V](#), 551 F. App’x 749, 751 n.2 (5th Cir. 2014) (per curiam) (quoting [Weems v. Hodnett](#), No. 10-CV-1452, 2011 WL 2731263, at *1 (W.D. La. July 13, 2011)).
- 2 [Makhlou v. Tailored Brands, Inc.](#), 2017 WL 10922311, at *5 (S.D. Tex. Mar. 23, 2017) (collecting authority).
- 3 [Weems](#), 2011 WL 2731263, at *1.
- 4 See [Doc. 625–1]
- 5 Fed. R. Civ. P. 26(b) (5).

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6 [Doc. 750-3] at 4.

7 Fed. R. Civ. P. 26(b)(5)(B).

8 [Doc. 762] at 3–4.

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Exhibit 6

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

STATE OF TEXAS, ET AL.;

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.;

Defendants,

and

KARLA PEREZ, ET AL.;

STATE OF NEW JERSEY,

Defendants-Intervenors.

Case No. 1:18-cv-00068

**PLAINTIFFS' SECOND AMENDED RESPONSES TO
DEFENDANT-INTERVENORS' SECOND SET OF DISCOVERY REQUESTS**

TO: Defendant-Intervenors, by and through their attorneys of record, Nina Perales, Mexican American Legal Defense and Educational Fund, 110 Broadway, Suite 300, San Antonio, Texas 78205; Carlos Moctezuma García, García & García, Attorneys at Law P.L.L.C., P.O. Box 4545, McAllen, Texas 78502.

Plaintiff States serve these second amended responses to Defendant-Intervenors' second set of interrogatories and requests for production of documents pursuant to the Federal Rules of Civil Procedure.

August 7, 2019

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on August 7, 2019, I served a copy of this document by electronic mail to all counsel listed below:

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COUNSEL FOR PLAINTIFF STATES

INTERROGATORY NO. 4:

Identify all costs that Plaintiffs, by state and year, have incurred since June 2012 or expect to incur in the future, with respect to providing goods, support and/or services to DACA recipients living in Plaintiff states. With respect to each cost identify:

- a. the category of the cost;
- b. the amount of the cost;
- c. whether Plaintiff states have paid the cost;
- d. the anticipated amount of future costs;
- e. the complete factual basis for asserting and computing the above costs; and
- f. all information, documents or other evidentiary material on which such assertions and computations are based.

RESPONSE:

Plaintiff States have incurred costs to provide goods, support, and/or services to DACA recipients living in Plaintiff States. Plaintiff States incorporate into this response the discussion of their costs contained in their complaint, briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached thereto. For example, Texas has spent more than \$375,000,000 over the past eleven years providing emergency Medicaid services to unlawfully present aliens, which encompasses DACA recipients. ECF No. 7 at 28; ECF No. 319 at 48. One of the Defendant-Intervenors' experts, Ray Perryman, opined that Texas incurs more than \$250,000,000 in total direct costs from DACA recipients per year. ECF No. 219, Ex. 1 at 4. It is also virtually certain that at least some DACA recipients in Texas—totaling over 125,000 as of September 2017—utilize the emergency Medicaid services throughout the State. ECF No. 319 at 51; ECF No. 1, Ex. 2 at 2. A survey conducted by one of the Defendant-Intervenors' other experts shows that 43% of DACA recipients are not covered by employer-based, private health insurance, meaning this percentage of DACA recipients is likely reliant on emergency Medicaid and community-based uncompensated care. ECF No. 319 at 51; ECF No. 225, Ex. 3 at 121. Alabama and Arkansas are able to estimate DACA-specific emergency Medicaid expenditures, as detailed at STATES000261–64 and STATES000267–69. Additionally, Alabama incurs a cost to provide driver's licenses to DACA recipients. *See* STATES000255–56. Plaintiff States have already produced documents responsive to this interrogatory. *See* STATES0001–000254.

Beyond the evidence attached to their complaint, motion for preliminary injunction, motion for summary judgment, and referenced above, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The declarations produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 5:

Identify the number of DACA recipients living in Plaintiff states, by state and year, since June 2012. For each Plaintiff state, please identify:

- a. the manner in which you determined the number of DACA recipients;
- b. the manner in which you determined the individuals are DACA recipients;
- c. the documents or other evidentiary material upon which you rely to support the conclusion that each such individual is a DACA recipient;
- d. the number of DACA recipients who attend public colleges or universities;
- e. the number of DACA recipients who attend public K-12 schools;
- f. the number of DACA recipients who are unaccompanied children (UAC);
- g. the number of DACA recipients who have received health care not compensated by the patient or an insurer.

RESPONSE:

According to Douglas S. Massey, there are 814,000 people registered for DACA. ECF No. 225, Ex. 73 at 7. According to Ray Perryman, there were 693,850 persons across the country enrolled in DACA as of March 31, 2018. ECF No. 225, Ex. 74 at 6. A chart showing the number of DACA applications that originated in each State can be found at Exhibit 2 of Plaintiff States' Original Complaint. ECF No. 1, Ex. 2 at 2. Another can be found at Exhibit 2 of Plaintiff States' Motion for Summary Judgment. ECF No. 358-2. Yet another can be found at Exhibit 62-G of DACA Intervenors' Response to Plaintiff States' Motion for Summary Judgment. ECF No. 400-9 at 186–87.

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to education and health care produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 6:

Identify the number of unaccompanied children (UAC)¹ living in Plaintiff states, by state and year, since June 2012. For each Plaintiff state, please identify:

- a. the total number of UAC;
- b. the total number of UAC who attend public K-12 schools;
- c. the total number of UAC who attend public colleges or universities;
- d. the amount of K-12 education costs each state incurs on UAC;
- e. the amount of higher education costs each state incurs on UAC;
- f. whether Plaintiff states have paid the cost;
- g. the anticipated amount of future costs;
- h. complete factual basis for asserting and computing the above costs; and
- i. all information, documents or other evidentiary material on which such assertions and computations are based.

RESPONSE:

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for UACs. The relevant declarations related to education produced at STATES000255 to STATES000323 are incorporated into this response.

¹ The term “unaccompanied children” can refer to the broader category of any children not in the physical custody of a parent or guardian. For purposes of their response, Plaintiffs assume that this interrogatory seeks information regarding “unaccompanied alien children.”

INTERROGATORY NO. 7:

Identify Plaintiff states' expenditures, by state and year, to provide Emergency Medicaid Services to DACA recipients since June 2012. For each Plaintiff state, please identify:

- a. the manner in which you determined the number of DACA recipients who receive Emergency Medicaid services;
- b. the manner in which you determined the individuals are or were DACA recipients; and
- c. all information, documents or other evidentiary material upon which you rely to support the conclusion that each such individual is a DACA recipient.

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing Emergency Medicaid services. Texas alone has spent more than \$375,000,000 over the past eleven years providing Emergency Medicaid services to unlawfully present aliens, including DACA recipients. ECF No. 7 at 28; ECF No. 319 at 48. It is also virtually certain that at least some DACA recipients in Texas—totaling over 125,000 as of September 2017—utilize the emergency Medicaid services throughout the State. ECF No. 319 at 51; ECF No. 1, Ex. 2 at 2. In addition, a survey conducted by one of the Defendant-Intervenors' experts shows that 43% of DACA recipients are not covered by employer-based, private health insurance, meaning this percentage of DACA recipients are likely reliant on emergency Medicaid and community-based uncompensated care. ECF No. 319 at 51; ECF No. 225, Ex. 3 at 121. 2016 NHIS data indicates that DACA-type adults who are not working have a 19 percent probability of using emergency room care. ECF No. 319 at 51 (citing Declaration of Leighton Ku ¶ 50). Alabama and Arkansas are able to estimate DACA-specific emergency Medicaid expenditures, as detailed at STATES000261–64 and STATES000267–69.

Beyond the evidence attached to their complaint, motion for preliminary injunction, motion for summary judgment, and referenced above, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to health care produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 8:

Identify Plaintiff states' expenditures, by year, to provide benefits under the Texas Children's Health Insurance Program (CHIP) Perinatal Coverage program to DACA recipients since 2012 and identify:

- a. the manner in which you determined the number of DACA recipients who receive benefits under the CHIP Perinatal Coverage program;
- b. the manner in which you determined the individuals are or were DACA recipients; and
- c. all information, documents or other evidentiary material upon which you rely to support the conclusion that each such individual is a DACA recipient.

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing Texas Children's Health Insurance Program services to unlawfully present aliens, including DACA recipients.

Other States do not provide benefits under the Texas Children's Health Insurance Program (CHIP) Perinatal Coverage program. Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Texas does not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The declaration produced at STATES000312 to STATES000313 is incorporated into this response.

INTERROGATORY NO. 9:

Identify Plaintiff states' expenditures, by year, to provide benefits under Texas's Family Violence Program to DACA recipients since 2012 and identify:

- a. the manner in which you determined the number of DACA recipients who receive benefits under Texas's Family Violence Program;
- b. the manner in which you determined the individuals are or were DACA recipients; and
- c. all information, documents or other evidentiary material upon which you rely to support the conclusion that each such individual is a DACA recipient.

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing Texas Family Violence Program services to unlawfully present aliens, including DACA recipients.

Other States do not provide benefits under the Texas Family Violence Program. Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Texas does not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The declaration produced at STATES000312 to STATES000313 is incorporated into this response.

INTERROGATORY NO. 10:

Identify each and every incident in Plaintiff states, by state and year, in which you contend that a DACA recipient was involved in the commission of a crime since 2012. For each such incident, please identify:

- a. the name of the DACA recipient;
- b. all information, documents or other evidentiary material upon which you rely to support the conclusion that each such individual is a DACA recipient;
- c. the crime which the DACA recipient was charged;
- d. the court in which the DACA recipient was prosecuted;
- e. whether the DACA recipient was convicted, and if so, of what crime or crimes; and
- f. any information, documents or other evidentiary material related to the alleged crime, the identity of the victim or victims, and the conviction, if any.

RESPONSE:

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to law enforcement produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 11:

Identify each study or report that you prepared, obtained or requested on the correlation, if any, between DACA recipients and crime in any of the Plaintiff states, by state, or in any other part of the United States since June 2012. For any such study or report, please identify:

- a. the date you requested it;
- b. the date you obtained it;
- c. the author(s);
- d. the person or entity who commissioned it;
- e. the person or entity who paid for or is responsible for paying for it; and

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing law-enforcement services related to unlawfully present aliens, including DACA recipients.

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to law enforcement produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 12:

Identify each study or report that you prepared, obtained or requested on the correlation, if any, between DACA recipients and the cost, benefit, and/or the quality of education to residents in Plaintiff states, by state, since June 2012. For any such study or report, please identify:

- a. the date you requested it;
- b. the date you obtained it;
- c. the author(s);
- d. the person or entity who commissioned it; and
- e. the person or entity that paid for or is responsible for paying for it.

RESPONSE:

Plaintiff States incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing education to unlawfully present aliens, including DACA recipients. Plaintiffs also refer Defendant-Intervenors to their response to Interrogatory No. 4 identifying certain costs incurred by Texas in providing healthcare services to unlawfully present aliens.

Plaintiff States also note that the continued existence of DACA compels states like Texas to expend funds, including in education, that it would not otherwise be compelled to spend. For instance, many DACA recipients and several of the Defendant-Intervenors went to public school in Texas, each of which costs the State of Texas thousands of dollars per year. ECF No. 319 at 106–107.

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to education produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 12:

Identify each study or report that you prepared, obtained or requested on the correlation, if any, between DACA recipients and the cost, benefit, and/or the quality of healthcare services to residents in Plaintiff states, by state since June 2012. For any such study or report, please identify:

- a. the date you requested it;
- b. the date you obtained it;
- c. the author(s);
- d. the person or entity who commissioned it; and
- e. the person or entity that paid for or is responsible for paying for it.

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing healthcare services to unlawfully present aliens, including DACA recipients. Plaintiffs also refer Defendant-Intervenors to their response to Interrogatory No. 4 identifying certain costs incurred by Texas in providing healthcare services to unlawfully present aliens.

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to health care produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 13:

Identify each study or report that you prepared, obtained or requested on the correlation, if any, between DACA recipients and the cost, benefit, and/or the quality of law enforcement services to residents in Plaintiff states, by state, since June 2012.

If so, for each study or report, please identify:

- a. the date you requested it;
- b. the date you obtained it;
- c. the author(s);
- d. the person or entity who commissioned it; and
- e. the person or entity that paid for or is responsible for paying for it.

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents, which identify costs that Plaintiffs have incurred in providing law enforcement services to unlawfully present aliens, including DACA recipients.

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients. The relevant declarations related to law enforcement produced at STATES000255 to STATES000323 are incorporated into this response.

INTERROGATORY NO. 14:

For each interrogatory, identify each person answering the interrogatory, supplying any information relied upon in answering the interrogatory, or assisting in any manner with the preparation of answering the interrogatory.

RESPONSE:

The declarations produced at STATES000255 to STATES000323 identify the non-privileged response to this interrogatory.

INTERROGATORY NO. 15:

Identify each employer who hired a DACA recipient instead of a U.S. citizen because of the employer penalty pursuant to The Patient Protection and Affordable Care Act.

RESPONSE:

Plaintiffs incorporate into this response their complaint, the briefing on their motion for preliminary injunction, the briefing on their motion for summary judgment, and the exhibits attached to and cited in those documents. The implementation of DACA has injured the economic well-being of citizens of Texas, as these citizens are forced to compete in distorted labor markets making it more difficult for citizens to obtain a job. This is supported by the fact that DACA recipients receive work authorization under the program, adding 683,000 individuals nationwide and 112,000 individuals in Texas to the labor market. ECF No. 319 at 38; ECF No. 7, Ex. 11 at 92. DACA recipients also have a competitive advantage over non-DACA individuals being hired by employers with fifty or more employees, as the employers do not have to pay the cost of providing coverage to the DACA recipient, yet the employer has to do so for non-DACA employees. ECF No. 319 at 39. One of Defendant-Intervenor New Jersey's experts, Ike Brannon, bolstered this theory in saying that low-skilled DACA recipients "would increase competition with other people who are citizens who are also competing for low skilled jobs." ECF No. 319 at 39; ECF No. 289, Ex. 3 at 141.

The record in this case has also shown that some DACA recipients have been selected over other candidates for highly competitive positions. ECF No. 319 at 39. For instance, Defendant-Intervenor Esther Jeon was selected over other applicants for positions in Harvard University's Financial Aid Initiative and its Office of Equity, Diversity, and Inclusion. ECF No. 219, Ex. 19 at 5-6. Many businesses have indicated to the Court they would hire non-DACA employees if the program ended, as they would have to fill positions now occupied by DACA recipients. ECF No. 319 at 39; ECF No. 204, Ex. 1 at 18. In addition, New Jersey businesses informed the Court they would face an estimated \$6.3 billion in costs to replace DACA recipients if they were to lose their DACA status. ECF No. 204, Ex.1 at 18. This market imbalance undoubtedly supports Plaintiff States' claim that an injury to the economic well-being of citizens and other lawfully present workers exists, and the economic well-being of the Plaintiff States' residents is a quasi-sovereign interest sufficient to support standing. ECF No. 319 at 40.

Beyond the evidence attached to their complaint, motion for preliminary injunction, and motion for summary judgment, Plaintiff States do not keep the requested information in the manner in which it is sought and cannot compile the information without first being provided the names of and identifying information for DACA recipients.

REQUEST FOR PRODUCTION NO. 2:

Please produce each document or other evidentiary material you identified in any of your responses to Defendant-Intervenors' Interrogatories Nos. 4-15.

RESPONSE:

Plaintiffs refer Defendant-Intervenors to the documents attached to and cited in the complaint, motion for preliminary injunction, motion for summary judgment, and the documents already produced to Defendant-Intervenors. The declarations produced at STATES000255 to STATES000323 are incorporated into this response.

Exhibit 7

481 Fed.Appx. 969

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

Richard WINFREY, Jr., Plaintiff–Appellant

v.

SAN JACINTO COUNTY; James Walters, [San Jacinto County Sheriff](#); [Lacy Rogers](#), Former San Jacinto County Sheriff; Lenard Johnson, Former San Jacinto County Sheriff; Grover Huff, Texas Ranger; Ronald Duff, Texas Ranger; Fort Bend County; Milton Wright, [Fort Bend County Sheriff](#); Keith Pikett, Former Fort Bend County Sheriff, Defendants–Appellees.

No. 11–20555

I

July 27, 2012.

Synopsis

Background: Arrestee who spent more than two years in jail charged with capital murder before jury acquitted him brought § 1983 civil rights action against county and state law enforcement personnel alleging violation of due process rights, failure of supervisors to supervise and train investigators, failure to intervene and stop other personnel from violating his rights, and conspiracy to violate his constitutional rights. After limited discovery, county and law enforcement personnel moved for summary judgment and arrestee requested additional discovery. The United States District Court for the Southern District of Texas, [Lynn N. Hughes, J.](#), 2011 WL 2680771, granted summary judgment for all defendants, and arrestee appealed.

Holdings: The Court of Appeals, [Haynes](#), Circuit Judge, held that:

individual liability § 1983 claims failed as to state rangers and county sheriffs and deputy who were not objectively

unreasonable in seeking assistance from canine handler who was ostensible expert in scent-related evidence and so were entitled to qualified immunity;

official liability § 1983 claims failed as to county, sheriff, and deputy in official capacities; but

fact issue existed as to whether handler used procedures to cheat in scent line-up so as to preclude summary judgment on basis of qualified immunity for handler on § 1983 claims; and

search and arrest affidavits contained material falsehood and omitted irregularities casting doubt on jailhouse informant's story and likely violated Fourth Amendment, and so arrestee was entitled to additional discovery into mental state of sheriff and deputy who executed affidavits with respect to whether they were entitled to qualified immunity for those actions.

Affirmed in part, reversed in part, vacated, and remanded.

Attorneys and Law Firms

*[971 Gayle M. Horn](#), Esq., [Elizabeth Wang](#), Esq., Loevy & Loevy, Chicago, IL, for Plaintiff–Appellant.

[James Arthur Price, Jr.](#), Olson & Olson, L.L.P., Houston, TX, [Shanna Elizabeth Molinare](#), Assistant Attorney General, [Demetri Anastasiadis](#), Assistant Attorney General, Office of the Attorney General, Austin, TX, [Randall Weaver Morse](#), Assistant County Attorney, County Attorney's Office, Richmond, TX, for Defendants–Appellees.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:10–CV–1896.

Before [KING](#), [HIGGINBOTHAM](#), and [HAYNES](#), Circuit Judges.

Opinion

[HAYNES](#), Circuit Judge:*

Plaintiff–Appellant Richard Winfrey, Jr., appeals from the district court's grant of summary judgment on qualified immunity grounds in favor of Defendants–Appellees, a number of state actors sued in their individual and official capacities for alleged civil rights violations stemming from a murder investigation of Winfrey and his family. For the reasons that follow, we AFFIRM in part, REVERSE in part,

VACATE in part, and REMAND for proceedings consistent with this opinion.

I. Facts and Procedural History

In August 2004, Murray Wayne Burr was found murdered in his San Jacinto County home. The crime scene was grisly. Officers followed a blood trail from the front room of the house, through the kitchen, and into a bedroom, where they found Burr's body. He had been stabbed over two dozen times and had suffered a number of other injuries, including a slit throat. There were no signs of forced entry.

***972** Then–San Jacinto County Sheriff Lacy Rogers, and his deputy, Lenard Johnson, initially investigated. Rogers decided to call the Texas Rangers for assistance, and they assigned Ronald Duff and Grover Huff (the “Rangers”) to the case. Huff brought in Keith Pikett, a canine handler and ostensible expert in scent-related evidence then working as a Fort Bend County deputy.

The investigation soon focused on the Winfrey family, who lived a few miles away. The Winfreys knew Burr. Winfrey and his sister, Megan, attended a school where Burr worked as a janitor. They sometimes visited Burr's home.

A few weeks after the murder, Pikett conducted a “scent line-up” using two of his bloodhounds and scent samples obtained from Winfrey and Megan. In the scent line-up, Pikett “scented” the bloodhounds on an item taken from the crime scene and then walked the dogs down a line of six cans, each containing a gauze “scent pad.” According to Pikett, both dogs alerted to the can containing Winfrey's scent; Winfrey contends that Pikett cued his dogs.

The cans were then refreshed with another set of scent pads, including a scent pad obtained from Megan. The dogs alerted on the can containing Megan's scent. The scent pads were again replaced, this time introducing a scent pad from a suspect ultimately excluded by DNA evidence. The bloodhounds failed to alert during their final walkthroughs.

Pikett then conducted a “drop trailing” exercise. Starting at the crime scene, Huff scented the bloodhounds with what he believed was a scent sample taken from Winfrey. The dogs then followed the scent from Burr's house to the Winfrey residence. Huff later informed Pikett that he mistakenly had

scented the dogs with a sample taken from Christopher Hammond, Megan's boyfriend.

Hammond denied having ever been at the crime scene, and the bloodhounds had not alerted during the scent line-up to a sample taken from him. Huff, however, observed that Hammond had a cut on his face and discovered a stain on Hammond's shoe-strings that later tested positive for blood. The investigators were unable to obtain a DNA sample from the blood stain and continued investigating the Winfreys.

Sheriff Rogers later used the scent line-up and drop-trail results to obtain a search warrant for samples of Megan's hair. Rogers failed to disclose the use of Hammond's scent pad, stating instead that the drop-trail was conducted “using the scent pad from” Winfrey. Winfrey and Megan cooperated in the collection of DNA. Forensic evidence taken from the crime scene, including hairs and fingerprints, excluded the Winfreys. The investigation stalled.

Almost two years later, David Campbell, an inmate at the Montgomery County Jail, told a jailer that he had information about Burr's murder. At the time, Richard Winfrey, Sr. (“Senior”), was an inmate at the jail and shared the same “tank” as Campbell. It was not the first time Senior had been in prison; he had been released from custody shortly before Burr's death. Campbell apparently harbored some unspecified animosity towards Senior; Senior's sister later apologized to Campbell for Senior's having “treated [him] like crap.”

Deputy Johnson first visited Campbell alone. According to Johnson's June 2006 Report, Campbell claimed that Senior had admitted to killing Burr by beating him and cutting open his neck, an accurate description of Burr's injuries. Senior also allegedly told Campbell that he had cut off Burr's penis and “placed it in Burr's mouth,” but Burr had not been so mutilated. Senior also gave a motive for the ***973** murder: that Burr had molested one of the Winfrey children. Senior allegedly “had his kids help him get into Burr's house,” where they remained during the crime.

About a month later, Johnson visited Campbell again, accompanied by Rogers. Campbell's story changed on this visit. Although he maintained that Senior admitted to killing Burr, Campbell now claimed that Senior “had stabbed and shot” Burr. There is no evidence in the record suggesting that Burr sustained a gunshot wound. Instead of the Winfrey children, Campbell now fingered one of Senior's cousins as an accomplice. Senior also allegedly confessed to having stolen

two firearms, an “old .22 and ... a .3030 long gun,” and a knife from Burr's house, which he had hidden in a nearby “hollow.” Burr's brother-in-law later confirmed that Burr owned a .22 caliber “semi auto and a single shot 410 [gauge] shotgun.” The weapons were never found.

Campbell's “jailhouse-snitch” evidence restarted the murder investigation. Rogers procured a search warrant for Senior's DNA using the 2004 scent results and Campbell's information. Rogers's affidavit omitted Campbell's inconsistencies and falsely related that the bloodhounds had drop-trailed from Burr's house to the Winfreys' “using the scent pads that [the dogs] had alerted to” in the scent line-up.¹ For the first time (at least from the available records), Rogers reported that Campbell said that Burr had been killed in the front room of his house, information that apparently had not been made public. Pikett later conducted another scent line-up, this time with scents taken from Senior. The bloodhounds alerted each time to Senior's scent pad. See *Winfrey v. State*, 323 S.W.3d 875, 881 (Tex.Crim.App.2010). Although the record appears to contain only a search warrant affidavit for Senior, Johnson obtained a search warrant to collect evidence from Winfrey on the same day.

Winfrey, Megan, and Senior were each charged with capital murder. Megan and Senior were convicted and received lengthy prison sentences. Pikett's dog-scent evidence and Campbell's statements played a large role in their trials. The jury in Senior's trial apparently convicted him based solely on the dog-scent evidence. See *id.* at 882 & n. 9 (“The jury submitted a note asking, ‘Is it illegal to convict solely on the scent pad evidence?’”). The Texas Court of Criminal Appeals later held that insufficient evidence supported Senior's conviction and acquitted him. *Id.* at 885.

Winfrey went to trial in June 2009. The jury found him not guilty after only thirteen minutes of deliberation. He had spent over two years in jail. By then, Pikett and his methods had come into disrepute. He retired from the Fort Bend County Sheriff's Office in early 2010.

Winfrey subsequently filed the instant suit in federal court. He brought four § 1983 claims, alleging that (1) the Defendants violated his due process rights; (2) those Defendants serving in a supervisory capacity had failed to supervise and train the investigators; (3) at least one of the Defendants failed to intervene and stop the other Defendants from violating

his rights; and (4) the Defendants conspired to violate his constitutional rights.²

*974 Most Defendants answered, but the Rangers filed a motion to dismiss, which the district court stayed pending limited discovery. The district court ordered the production of documents from Winfrey's state court proceedings, as well as “information about dog-scent lineups that [had] been conducted in” San Jacinto County and about the Texas Department of Public Safety's (“DPS”) “policies or manuals on dog-scent lineups.” Given this limited discovery, the district court ordered the parties to file motions for summary judgment. The Defendants complied.³ Winfrey responded and filed a [Federal Rule of Civil Procedure 56\(d\)](#) affidavit requesting additional discovery.

The district court granted summary judgment for the Defendants, reasoning primarily that Winfrey had “[a]t best” shown that “this is a case about a negligent investigation.”⁴ The district court did not explicitly rule on Winfrey's [Rule 56\(d\)](#) affidavit, considering the request for additional discovery to be a “dodge[].” It believed that “[a]dditional discovery [was] unnecessary [because] the essential facts of the[] events [were] known.” Winfrey timely appealed.

II. The District Court's Summary Judgment Ruling⁵

Generally speaking, Winfrey's case depends on establishing the following: (1) Pikett's methods were deficient and violated Winfrey's constitutional rights; (2) the Defendants knew it; (3) Pikett was brought into the investigation expressly to gin up false evidence against Winfrey; (4) Pikett cued the bloodhounds to alert on Winfrey's scent; and (5) the Defendants knowingly used false evidence and failed to prevent the violation of Winfrey's constitutional rights. Because Winfrey failed to show that most of the Defendants acted objectively unreasonably, the bulk of the district court's ruling stands. However, we conclude (1) that Winfrey introduced sufficient summary judgment evidence that Pikett cued his dogs such that summary judgment in Pikett's favor should be reversed, and (2) that Winfrey should have *975 been allowed to obtain additional discovery concerning Rogers and Johnson's alleged use of false evidence to secure search and arrest warrants.

A. Qualified and Municipal Immunity Bar Most of Winfrey's Claims

“Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, — U.S. —, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’ ” *Id.* at 2083 (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). This “objective legal reasonableness” standard “‘ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful.’ ” *Pearson v. Callahan*, 555 U.S. 223, 244, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)). Accordingly, “[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.” *Messerschmidt v. Millender*, — U.S. —, 132 S.Ct. 1235, 1244–45, 182 L.Ed.2d 47 (2012) (internal quotation marks and citations omitted).

Most of Winfrey’s § 1983 claims against those Defendants sued in their individual capacities fail because, even if he alleges violations of clearly-established constitutional rights, he lacks evidence showing that the Defendants were “on notice that their actions were unlawful.” *Pearson*, 555 U.S. at 244, 129 S.Ct. 808. Winfrey assumes that it was objectively unreasonable to rely on evidence procured from Pikett’s dog-scent line-ups and the drop-trail. To that end, he marshals evidence that disputes the reliability of Pikett’s methods and the credibility of his credentials.

Pikett’s fall from grace, however, does not show that the Rangers, Rogers, and Johnson were objectively unreasonable in seeking Pikett’s assistance and then using the resulting information as part of their investigation, let alone that they actually knew that Pikett was a fraud at the time in question. Pikett enjoyed a solid reputation at the time of Burr’s murder. The FBI occasionally turned to Pikett on a variety of matters,

and at least one Texas court had held that scent line-ups were a “legitimate field of expertise” and that Pikett’s methods properly relied upon and utilized the principles involved in the field. *See Winston v. State*, 78 S.W.3d 522, 526–29 (Tex.App.—Houston [14th Dist.] 2002, pet. denied); *see also Robinson v. State*, No. 09–06–051, 2006 WL 3438076, at *4 (Tex.App.—Beaumont Nov. 29, 2006, no pet.) (unpublished) (following *Winston* in another case involving Pikett).

Indeed, the Texas Court of Criminal Appeals only recently addressed the probative value of Pikett’s evidence. It held that such evidence is admissible, but that, “standing alone, it is insufficient to establish a person’s guilt beyond a reasonable doubt.” *Winfrey*, 323 S.W.3d at 885. Nothing in *Winfrey* suggests that Pikett’s evidence is insufficient to establish probable cause.

Although the expert affidavits proffered by Winfrey highlight numerous defects *976 in Pikett’s work, they do not claim that such errors were so obvious that they would have been apparent to officers untrained in canine handling. Accordingly, even assuming that the investigators violated Winfrey’s clearly-established constitutional rights, Winfrey presents no evidence suggesting that they knew or should have known that Pikett’s involvement necessarily entailed such violations. Pikett’s conduct alone therefore cannot establish that the Rangers, Rogers, and Johnson knowingly passed along Pikett’s allegedly false evidence, consciously disregarded a duty to intervene, or willfully conspired to violate Winfrey’s constitutional rights.⁶

Winfrey’s § 1983 claims against San Jacinto County and Rogers and Johnson in their official capacities fail for similar reasons.⁷ These are municipal liability claims. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (“Official-capacity suits ... ‘generally represent only another way of pleading an action against an entity of which an officer is an agent.’ ” (citation omitted)). Municipal liability requires proof of an “official policy,” a “final” policymaker, and the policymaker’s “knowledge” of, or “deliberate indifference” to, a risk of constitutional violations. *See, e.g., Burge v. St. Tammany Parish*, 336 F.3d 363, 369–73 (5th Cir.2003); *Piotrowski v. City of Houston*, 237 F.3d 567, 578–83 (5th Cir.2001); *see also Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Municipal liability analysis turns on whether a plaintiff establishes that the relevant policymaker knew or should have known that the alleged policy created a high risk of constitutional violations; this “knowledge” requirement is

the “*sine qua non* of municipal liability under [section 1983](#).” [Burge](#), 336 F.3d at 370.

Winfrey fails to introduce summary judgment evidence of any municipal liability element. He complains of San Jacinto County's *de facto* policies and practices of “pursu[ing] wrongful arrests and convictions through profoundly flawed investigations and fabricated evidence, including junk science evidence.” The only potential policy Winfrey identifies that relates to Pikett is the use of dog-scent evidence. The district court ordered that San Jacinto County “produce its information about dog-scent lineups that have been conducted in the county.” This evidence established that the Burr investigation was the first in San Jacinto County to use Pikett. Municipal liability may lie for a single constitutional violation, but claims premised on *de facto* policies and acts by municipal employees must establish deliberate indifference. *See City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123–27, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). That “generally requires that a plaintiff demonstrate ‘at least a pattern of similar violations.’ ” [Burge](#), 336 F.3d at 370 (citation omitted). Winfrey thus cannot show that a final policymaker, presumably Rogers, knew or should have known that constitutional violations *977 were the “obvious consequences” of Pikett's involvement. *Id.*

B. Some of Winfrey's § 1983 Claims Survive

Winfrey, however, presented summary judgment evidence supporting his allegations that Pikett cued his dogs during the scent line-up and that Rogers and Johnson both omitted material information and provided false statements in their search and arrest warrant affidavits in an effort to “frame” him.

1. *Pikett and the Scent Line-ups.*—The district court reasoned that Winfrey provided only speculation to show that Pikett cued his dogs. The scent line-up, however, was videotaped. Although the video is not in the record on appeal, the parties referenced it below, and Winfrey provided the affidavit of Steven Nicely, a police canine expert who reviewed the film.

Nicely concludes that Pikett manufactured his results, finding that “[t]he line-up procedures used by Deputy Pikett support[] [the conclusion that] behaviors the dogs do exhibit are more likely to be induced by conscious actions

than unconscious actions.” Nicely's conclusion rests on two general observations: First, he determined that Pikett's procedures “are more consistent with him using his ability to see inside the cans and identi[f]y which can contains the target pad than relying on his dogs to identify the can by odor.” Second, he observed actions that “were consistent with attempting to induce a behavior,” *i.e.*, cuing, specifically “jerk[ing]” on the dogs' leashes and strategically stopping as he paced down the row of cans. Nicely's affidavit comports with those of experts retained in other cases challenging Pikett's methods, which reason that Pikett cued his dogs by manipulating their leashes and by altering his footsteps during scent line-ups. In another case, one of those experts concluded that the dogs gave no visible signs of alerting to the target scent.

Winfrey therefore raised a sufficient issue of material fact. Pikett denies that he cued the dogs or otherwise used procedures that allowed him to “cheat.” Winfrey provided summary judgment evidence that he did. At this juncture, the evidence and all reasonable inferences must be construed in the light most favorable to Winfrey; “ ‘[t]he ultimate truth will be determined at trial....’ ” [Good v. Curtis](#), 601 F.3d 393, 399 n. 1 (5th Cir.2010) (citation omitted). Winfrey alleged and presented evidence that Pikett made “knowing efforts to secure a false identification,” and such actions violate clearly established constitutional rights. *Id.* at 398. To that extent, Pikett is not entitled to qualified immunity, and we reverse the summary judgment granted to him.

2. *Rogers and Johnson's Investigation.*—Winfrey also claims that Rogers and Johnson used false information to secure search and arrest warrants and failed to disclose exculpatory evidence. The district court acknowledged that Rogers's search affidavit to obtain DNA from Megan falsely stated that the drop-trail had used Winfrey's scent, but it concluded that the error was unintentional and that Winfrey suffered no constitutional injury because the evidence obtained bore no fruit. As to Winfrey's exculpatory-evidence argument, the district court focused on whether Winfrey could show that Rogers and Johnson knew of the infirmities underpinning Pikett's methods. The record, however, suggests that Rogers and Johnson may have acted recklessly in submitting warrant affidavits that contained false statements and material omissions that affected Winfrey's constitutional rights even without respect to the question of Pikett's methods.

*978 Even if there is a violation of a clearly-established constitutional right, a plaintiff must still prove the objective

unreasonableness of the complained-of act. Because the alleged predicate constitutional injury here concerns search and arrest warrant affidavits, we turn to Fourth Amendment principles.

The fact that a neutral magistrate issues a warrant is not dispositive of whether an officer's underlying actions were objectively reasonable. See *Messerschmidt*, 132 S.Ct. at 1245. Qualified immunity will not attach if a “reasonably well-trained officer in [the officer's] position would have known that his affidavit failed to establish probable cause.” *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

Objective reasonableness in this context depends in part on the information available to the officer. See *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Generally, when an officer is aware of material information casting doubt on, or directly contrary to, the information contained in a warrant affidavit, that fact may serve as evidence that “a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.” *United States v. Leon*, 468 U.S. 897, 922 n. 23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Accordingly, the “deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based.” *Leon*, 468 U.S. at 914, 104 S.Ct. 3405 (citing *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

The record lacks search and arrest affidavits for Winfrey; the documents likely were destroyed in an effort to comply with an expunction order. The affidavits concerning Megan and Senior, however, suggest that Rogers and Johnson used the same affidavit language for all three Winfreys, and investigation reports indicate that warrants were obtained for Winfrey on the same day Johnson executed an arrest warrant affidavit for Megan. Notably, Rogers indicated that the drop-trail evidence and Campbell's “jailhouse snitching” established probable cause to obtain “a search warrant for the hairs of my suspects.” (emphasis added).

These documents contain a material falsehood. They reiterate that the drop-trail from the crime scene to the Winfrey house used Winfrey's scent. Huff, however, informed Pikett that he mistakenly used Hammond's scent, and Pikett included this information in his report prepared the day after the line-ups and drop-trail were conducted. Rogers and Johnson

executed the affidavits two years later, when no time exigency existed that would have explained the absence of accurate information.

The affidavits also omit irregularities in Campbell's story. According to Rogers and Johnson's contemporaneous reports: Campbell said that Senior shot and mutilated Burr—not true. Campbell first said Senior's kids assisted in the murder, then averred that it was one of Senior's cousins—a major inconsistency. Senior allegedly murdered Burr in retribution for molesting one of the Winfrey children—no corroboration of any such molestation appears in the record. Moreover, the allegedly stolen guns and knife were never found, and Burr's family reported that he previously owned a small-bore shotgun, not the .3030 caliber long rifle described by Campbell.

Johnson's arrest warrant also notably omits information concerning forensic evidence while including somewhat irrelevant facts. The affidavit recounts an altercation between Megan and a high school teacher that occurred over a year-and-a-half before the murder. Although Johnson included this questionable propensity *979 evidence, he failed to mention that several rounds of DNA testing on forensic evidence recovered from the crime scene had excluded Megan and that the drop-trail did not use Winfrey's scent. Assuming that the affidavits for Winfrey and Megan were substantially similar, the same exculpatory information would have been left out of the affidavit for Winfrey.

Although the “threshold for establishing [the objectively unreasonable] exception is a high one,” *Messerschmidt*, 132 S.Ct. at 1245, the record suggests that Winfrey may meet that threshold at least for summary judgment purposes. In the light most favorable to Winfrey, the false statement and material omissions impugn Rogers and Johnson's “objective good faith” and suggest that their “transgressions” were not “minor.” *Leon*, 468 U.S. at 908, 104 S.Ct. 3405.

The record indicates that Rogers and Johnson heavily relied on the false drop-trail representation and incomplete information regarding Campbell. In his search warrant affidavit for Senior's DNA, Rogers suggested that Campbell's story about Senior's confession and the drop-trail evidence implicating the “other two suspects” were the two primary reasons the officers had “enough ‘P.C.’ to get a search warrant.” That same evidence featured prominently in Johnson's probable cause affidavit for Megan, which also omitted any reference to the consistently exculpatory DNA

evidence. It is a reasonable assumption that the same defects infected the warrant affidavits for Winfrey.

Yet, “[w]hen the Fourth Amendment demands a factual showing sufficient to comprise ‘probable cause,’ the obvious assumption is that there will be a *truthful* showing.” *Franks*, 438 U.S. at 164–65, 98 S.Ct. 2674 (citation omitted). “This does not mean ‘truthful’ in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge that sometimes must be garnered hastily.” *Id.* at 165, 98 S.Ct. 2674. Instead, the warrant requirement imposes an obligation to “set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter.” *Id.* That extends to providing facts concerning the reliability of the information and the credibility of its source and to avoiding “deliberately or reckless[ly] false statement[s].” *Id.* (describing the use of such statements in a warrant affidavit as “an unthinkable imposition upon [a magistrate’s] authority”).

The warrant affidavits here fail this standard. As presented to the magistrate, the affidavits’ three primary pieces of evidence—the scent line-ups, drop-trail, and Campbell’s story—all pointed to the Winfreys. Even if the false statement about Winfrey’s scent stemmed from a cursory reading of Pikett’s report, however, the use of a fact explicitly contrary to the report may reasonably be characterized as reckless here. In contrast to the typical “mistake” situation where an investigation’s exigencies causes facts to be “garnered hastily,” *id.*, Rogers and Johnson had several years to review the report’s contents and other facts before executing the affidavits.

It was similarly problematic to omit all of the information casting doubt on Campbell’s credibility and the DNA test results. Some of Campbell’s inconsistencies were glaring, others minor. All undercut his reliability, and, like the DNA test results that challenged the conclusions drawn from Pikett’s dog-scent evidence, none were presented to the magistrate who issued the warrants. The warrant affidavits therefore likely deprived the magistrate of the opportunity to independently weigh *980 whether Rogers and Johnson’s evidence established probable cause.

Qualified immunity, however, provides “immunity from suit rather than a mere defense to liability.” *Mitchell v.*

Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).⁸ The question, then, is when qualified immunity attaches for such § 1983 claims. *Franks* provides helpful guiding principles. *Cf. Malley*, 475 U.S. at 344, 106 S.Ct. 1092 (holding “that the same standard of objective reasonableness ... applied in the context of a suppression hearing ... defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest”). To show he is entitled to a *Franks* hearing, a criminal defendant challenging the veracity of a warrant affidavit must “make[] a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and [that] the allegedly false statement is necessary to the finding of probable cause.” *Franks*, 438 U.S. at 155–56, 98 S.Ct. 2674. That requires “allegations of deliberate falsehood or of reckless disregard for the truth, ... accompanied by an offer of proof. [The allegations] should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.... Allegations of negligence or innocent mistake are insufficient.” *Id.* at 171, 98 S.Ct. 2674.

Applying these principles here, we conclude that Winfrey has made a sufficiently “substantial preliminary showing” to make qualified-immunity summary judgment for Rogers and Johnson inappropriate at this juncture. The district court should first have allowed Winfrey to conduct additional discovery to determine whether Rogers and Johnson executed affidavits with at least “a reckless disregard for the truth,” *i.e.*, acted objectively unreasonably. As noted above, Rogers considered the false information crucial to getting “enough P.C.,” and the omitted information concerning Campbell’s reliability and the DNA test results materially challenged the information Johnson decided to include in his arrest warrant affidavit. It may be that these errors and omissions resulted from carelessness or run-of-the-mill negligence. *See, e.g., United States v. Astroff*, 578 F.2d 133, 136 (5th Cir.1978) (en banc) (holding that allegations of “negligent misrepresentation” are insufficient to render a warrant invalid or to show entitlement to a *Franks* hearing). Yet, for qualified immunity purposes, it is also possible that they occurred out of recklessness.

Because the issue of recklessness requires inquiry into the specifics of what Rogers and Johnson knew and why they completed the affidavits as they did,⁹ the *981 district court should have allowed Winfrey additional discovery on his

false-evidence claim given his threshold showing of objective unreasonableness.¹⁰ *Cf. Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir.1991) (“Because of the difficulties attendant to rebutting the professed state of mind of a party-opponent through summary judgment evidence, the district court should be generous in its allowance of discovery requests aimed at uncovering evidence of the moving party's state of mind.”). We therefore vacate the district court's ruling as to Rogers and Johnson's alleged use of false evidence, and remand for additional discovery.

C. Additional Summary Judgment Issues Concerning the Counties

Before addressing the district court's treatment of Winfrey's Rule 56(d) affidavit, we briefly discuss two summary judgment issues bearing on Fort Bend and San Jacinto Counties' municipal liability. Winfrey alleges that San Jacinto County maintained *de facto* policies and practices that permitted “wrongful convictions and arrests through profoundly flawed investigations and fabricated evidence, including junk science evidence.” Because Rogers presumably was San Jacinto County's final policymaker for the Burr case, Winfrey need not have shown deliberate indifference to establish the County's culpability for Rogers's conduct in executing his warrant affidavits. *See Praprotnik*, 485 U.S. at 123–27, 108 S.Ct. 915. The patent unconstitutionality of presenting false information to or materially misleading a magistrate would allow a presumption that Rogers “was not only aware of the specific polic[ies], but was also aware that a constitutional violation most likely [would] occur.” *Burge*, 336 F.3d at 370 (citation omitted).

Winfrey also brings a failure-to-train and supervise claim against San Jacinto County. This claim necessarily is premised on Johnson's actions and, thus, *respondeat superior*.¹¹ These types of municipal liability claims do require evidence of deliberate indifference. *See, e.g., Connick v. Thompson*, — U.S. —, 131 S.Ct. 1350, 1360, 179 L.Ed.2d 417 (2011) (noting, in rejecting a “single-incident” municipal liability claim, that “[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights”). The district court, however, allowed discovery only of information concerning San Jacinto County's dog-scent line-

ups. That evidence did not specifically address the elements of a supervisory claim premised on the use of false evidence.

*982 Winfrey, however, has forfeited these points by failing to specifically make either argument on appeal. *See, e.g., Gen. Universal Sys. v. HAL, Inc.*, 500 F.3d 444, 454 (5th Cir.2007). Moreover, he frames the municipal liability issue as one that turns on San Jacinto County's knowledge of Pikett's “fraud” and the availability of discovery to that end. Because Winfrey cannot show that San Jacinto County knew or should have known that its employees would violate his rights by using Pikett for the first time, his municipal liability claims against San Jacinto County fail. We affirm the district court on this issue.

The district court also did not err in granting summary judgment on Winfrey's supervisory claims against Fort Bend County. Pikett notes that he was assigned by Fort Bend County to work on the Burr investigation in the regular scope of his employment. Accordingly, Fort Bend County could be liable under § 1983 if it knew or should have known that Pikett gamed the results of his dog-scent investigations or otherwise used procedures that created a high risk of constitutional violations.

Winfrey, however, fails to make the more basic showing of sufficiently identifying and describing the inadequacies of a Fort Bend County policy that permitted Pikett's alleged misconduct. Instead, he essentially reiterates his belief that Pikett's missteps were so obvious that Fort Bend County Sheriff Milton Wright could have avoided knowledge of the resulting constitutional violations only by maintaining a *de facto* policy of ignorance. As demonstrated by his inability to articulate how Wright—presumably the relevant final policymaker for this issue—was personally involved, *see supra* note 6, Winfrey therefore responded to summary judgment by doing little more than resting on conclusory, generic allegations in his complaint. *Cf. Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir.1997) (noting, in motion to dismiss context, the inadequacy of such tactics in satisfying the heightened pleading requirements of municipal liability claims). In light of this, the district court had no obligation to permit Winfrey additional discovery against Fort Bend County. *See Int'l Shortstop*, 939 F.2d at 1267. Thus, we affirm the district court as to Winfrey's supervisory claims.

III. Winfrey's Rule 56(d) Affidavit and Additional Discovery Requests

“When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error.” *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 720 (5th Cir.1999). Rule 56(d) allows nonmovants to identify and request discovery of such information “by affidavit or declaration.” In response, “the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Fed.R.Civ.P. 56(d)(1)–(3).

Rule 56(d) “discovery motions are ‘broadly favored and should be liberally granted’ because the rule is designed to ‘safeguard non-moving parties from summary judgment motions that they cannot adequately oppose.’ ” *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir.2010) (citation omitted). As a general matter, district courts should grant “a continuance for additional discovery if [the nonmovants]: (i) requested extended discovery prior to the court's ruling on summary judgment; (ii) placed the district court on notice that further discovery pertaining to the summary judgment motion was being sought; and (iii) demonstrated to the district court with reasonable specificity how the requested discovery pertained to the pending motion.” *983 *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1291 (5th Cir.1994) (citations omitted). “The nonmoving party must show how the additional discovery will defeat the summary judgment motion, that is, will create a genuine dispute as to a material fact, and ‘may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts.’ ” *Int'l Shortstop*, 939 F.2d at 1267 (citations omitted). Rule 56(d) rulings lie within the district court's sound, but “not entirely unfettered,” discretion. *Id.*

Winfrey identified fifteen additional areas of discovery that he contended were necessary to adequately respond to the Defendants' summary judgment motions. For most requests, the district court did not abuse its discretion in denying further discovery. As discussed above, the district court abused its discretion, however, by not allowing Winfrey to probe why Rogers and Johnson failed to disclose in their warrant affidavits that the drop-trail used Hammond's scent, that Campbell gave inconsistent statements—some

of which contradicted known facts—and that various DNA tests had excluded the Winfreys. Such evidence was relevant to establishing the objective reasonableness of Rogers and Johnson's actions. The record as developed at summary judgment inadequately spoke to that issue.

We also conclude that the district court abused its discretion by not ordering the production of a report concerning Pikett's drop-trail exercise from another case that, according to Nicely, was a “substantively different” version of the same report produced in this case. Nicely averred that the report was under a protective order and that he could discuss it only under court order. Given this potentially material discrepancy in a heavily relied-upon report and the specificity of Winfrey's request, the district court should have allowed Winfrey access to the document. In all other respects, we conclude that the district court did not abuse its discretion in its denial of the requested discovery.

IV. Conclusion

Winfrey adduced sufficient evidence to survive qualified-immunity summary judgment on his due process claims against Pikett, and we reverse the summary judgment granted to him as to that count. The district court erred in not ordering additional discovery essential to Winfrey's showing Rogers and Johnson's potential recklessness in using false evidence and omitting material facts in their arrest and search warrant affidavits. It also abused its discretion in denying a handful of Winfrey's Rule 56(d) discovery requests as described above; accordingly, we vacate and remand the summary judgment as to those matters. The district court properly granted summary judgment for the Defendants as to all of Winfrey's other claims, and we affirm the summary judgment in all other respects. We note that the district court remains free to reassess the affirmed discovery determinations as it deems appropriate in light of further proceedings. Accordingly, we AFFIRM in part, REVERSE in part, VACATE in part, and REMAND for proceedings consistent with this opinion. Appellant's motion for reassignment in the district court is DENIED.

All Citations

481 Fed.Appx. 969

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

1 The probable cause affidavit for Megan is almost identical to a search warrant affidavit used to collect Senior's DNA.

2 Winfrey also brought state-law claims for malicious prosecution, abuse of process, intentional infliction of emotional distress, and civil conspiracy. He does not reurge these claims on appeal.

3 The line between dismissal and summary judgment is somewhat unclear in the record. Some Defendants couched their motions in terms of both dismissal and summary judgment. The district court dismissed Winfrey's claims against the Rangers several months before its summary judgment ruling. The summary judgment order occasionally uses dismissal-like language, but it purports to grant summary judgment for all defendants.

These ambiguities do not affect our review; we treat Winfrey's appeal as arising entirely from a grant of summary judgment. See *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1293 (5th Cir.1994) ("Although the district court ... granted a dismissal as to [some parties], it also granted summary judgment as to *all* the defendants based on evidence not contained in the pleadings. Under these circumstances, the district court's order to dismiss the complaint as to [some parties] is disregarded, and we instead review the grant of summary judgment as to all defendants—including [the dismissed parties]." (citations omitted)).

4 The district court summarily dismissed James Walters because he was not Sheriff of San Jacinto County during the murder investigation. Winfrey does not challenge that ruling.

5 We review a grant of summary judgment *de novo*, construing the evidence in the light most favorable to the nonmoving party. See, e.g., *United Fire & Cas. Co. v. Hixson Bros.*, 453 F.3d 283, 284–85 (5th Cir.2006). "Unsubstantiated assertions, improbable inferences, and unsupported speculation," however, "are not sufficient to defeat a motion for summary judgment." *Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir.2003). Summary judgment is appropriate if the moving party can show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

6 The same reasoning applies to Fort Bend County Sheriff Milton Wright, who Winfrey sued in both his official and individual capacities. The individual-capacity suit against Wright also fails because nothing in the record shows that Wright had any direct, personal involvement in the Burr investigation. See *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir.1983). Because an official-capacity suit against a county officer is a suit against a municipality, that aspect of Winfrey's suit is subsumed in the municipal liability discussion below.

7 Winfrey does not clearly state official-capacity claims against the Rangers. To the extent that he does, the following analysis also disposes of those claims.

8 *Franks* crafted its remedy in light of the perceived inadequacy of extant "alternative sanctions" including "a civil suit," suggesting that § 1983 provides a post-investigation remedy for the knowing or reckless inclusion of false information, or exclusion of material exculpatory information, in warrant affidavits. 438 U.S. at 169, 98 S.Ct. 2674; see also *Daniel v. Ferguson*, 839 F.2d 1124, 1129 n. 12 (5th Cir.1988) ("The [*Franks*] Court also concluded that alternative procedures, including civil suits, would not provide a sufficient remedy for untruthful affidavits."). Indeed, the Supreme Court has observed that sometimes such suits allow application of the exclusionary rule in a more efficient manner than suppression hearings. See *Malley*, 475 U.S. at 344, 106 S.Ct. 1092 ("[A] damages remedy for an arrest following an objectively unreasonable request for a warrant imposes a cost directly on the officer responsible for the unreasonable request, without the side effect of hampering a criminal prosecution.").

9 We recognize that the subjective motive of an officer executing a facially valid warrant generally is not an appropriate inquiry. See, e.g., *al-Kidd*, 131 S.Ct. at 2080–82. Winfrey, however, alleges that the affidavits were knowingly or recklessly false. Our inquiry, then, necessarily must consider what the officers knew and did in evaluating whether it was objectively reasonable for them to believe that their conduct was lawful. Cf. *Messerschmidt*, 132 S.Ct. at 1245 n. 2 (criticizing the dissent's reliance "on facts outside the affidavit" when there was "no contention ... that the affidavit was misleading in

omitting any of the facts on which the dissent relie[d]"); *Leon*, 468 U.S. at 922 n. 23, 104 S.Ct. 3405 (noting that courts may consider "all of the circumstances" bearing on the objective reasonableness inquiry).

- 10 Winfrey thus differs—at least on this issue—from the hypothetical § 1983 plaintiff with wide-ranging and conclusory allegations of officer misconduct against whom qualified immunity casts its protective shield.
- 11 "A plaintiff must show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a 'moving force' in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy." *Valle v. City of Houston*, 613 F.3d 536, 544 (5th Cir.2010) (citations omitted).

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Exhibit 8

2019 WL 4887265

Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

Irena WOJCIK, Plaintiff,
v.
MEMORIAL HERMANN
HEALTH SYSTEM, Defendant.

Civil Action No. H-17-3198

|
Signed 10/03/2019

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

Gray H. Miller, Senior United States District Judge

*1 Pending before the court is defendant Memorial Hermann Health System's ("Memorial Hermann") motion for summary judgment (Dkt. 36), plaintiff Irena Wojcik's response (Dkt. 41), and Memorial Hermann's reply (Dkt. 44).¹ Having considering the pleadings, the evidentiary record, and the applicable law, the court finds that Memorial Hermann's motion for summary judgment should be **GRANTED**.

I. BACKGROUND

This is an age discrimination and retaliation case brought pursuant to the federal Age Discrimination in Employment Act of 1967 ("ADEA"), and chapter 21 of the Texas Labor Code ("chapter 21"), popularly known as the Texas Commission on Human Rights Act ("TCHRA").² Wojcik was employed by Memorial Hermann as a physical therapy assistant from December 2009 until June 2017, when her position was eliminated as part of a reduction-in-force ("RIF"). Dkt. 36 at 4; Dkt. 41 ¶¶ 1, 5. Wojcik claims that this RIF was merely pretext and that she was actually terminated

as the result of age discrimination and retaliation for opposing that age discrimination.

From December 2009 to June 2015, Wojcik worked at Memorial Hermann's Beechnut Clinic. Dkt. 36 at 4; Dkt. 41 ¶ 2. In July 2015, Wojcik transferred to the Bellaire Clinic, where the alleged age discrimination occurred. Dkt. 36 at 4; Dkt. 41 ¶ 2. At the Bellaire Clinic, Wojcik worked under the supervision of Tamara "Nikki" Shelton, the Clinic Manager. Dkt. 36 at 9; Dkt. 41 ¶ 2. Shelton reported to Tim Couture, her Regional Director. Dkt. 36 at 4. Supervising the Bellaire Clinic was Shelton's first management job and Wojcik was her oldest employee. Dkt. 41 ¶ 3. During this time, Wojcik claims that she was "subjected to repeated acts of age discrimination" by Shelton. *Id.* For example, Wojcik claims that Shelton "would state that the 'dynamic of the clinic needs young people' " and "promoted youthful teambuilding events like a Christmas party featuring an American Ninja Warrior event." *Id.* Shelton once referred to Wojcik as a "grandma" when asking Wojcik to watch Shelton's son. Dkt. 41-7 at 727. And Shelton once told a patient of Wojcik's to get her green tea "because it's good for older people."³ Dkt. 41-6 at 718. Wojcik claims these events made her feel like "an outcast," and in May 2017, Wojcik claims to have brought her concerns to Shelton's attention. *Id.*

*2 In Summer 2017, Tim Couture was informed that he needed to reduce the number of employees as part of a RIF. Dkt. 36 at 6; *see also* Dkt. 41 ¶ 4. Wojcik's position was one of the eight that he eliminated. Dkt. 36 at 7. Couture initially considered transferring Wojcik to another location—the Town & Country Clinic. Dkt. 36 at 7–8; *see also* Dkt. 41 ¶ 4. However, Couture ultimately decided against transferring Wojcik after discussing it with Greg Dodson, the Town & Country Clinic Manager, and concluding that it would be better to hire another physical therapist instead of another PTA in order to meet the clinic's requirements to see new patients within 48 hours. Dkt. 36 at 8. On June 26, 2017, Wojcik was formally notified that her position would be terminated effective July 7, 2017. Dkt. 36 at 8–9. On July 5, 2017, Wojcik submitted a complaint to Memorial Hermann's Compliance Helpline, "indicating that she believed Dr. Shelton was terminating her employment because of her age." Dkt. 36 at 9; *see also* Dkt. 41 ¶ 6. This lawsuit follows.

II. STANDARD OF REVIEW

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Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant.” *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 377 (5th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). “If [the movant’s] burden is carried, then the nonmoving party must establish the existence of evidence creating an issue of fact that can be properly characterized as outcome-determinative.” *Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990) (citing *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195–96 (5th Cir. 1986)). Evidence is viewed in the non-movant’s favor. *Jackson*, 602 F.3d at 377 (citing *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 (5th Cir. 2002)). However, “[l]egal conclusions and general allegations do not satisfy this burden.” *Hanchey*, 925 F.2d at 97 (citing *Fontenot*, 780 F.2d at 1195–96).

III. ANALYSIS

A. Chapter 21

Memorial Hermann argues that this court lacks jurisdiction to hear Wojcik’s chapter 21 claims because she failed to wait 180 days before filing suit. Dkt. 36 at 10–12. Memorial Hermann grounds its arguments in *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991), overruled by *In re USAA*, 307 S.W.3d 299 (Tex. 2010). Wojcik counters that (1) chapter 21’s exhaustion requirement is not jurisdictional, and (2) because the ADEA only requires a plaintiff to wait 60 days before filing suit—which Wojcik did—and because chapter 21 is meant to “correlate state law with federal law,” this court has jurisdiction to hear Wojcik’s claims. Dkt. 41 at 9–10 (quoting *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 24 (Tex. 2000)). Both sides’ arguments miss the mark.

Wojcik is correct that the requirement is not jurisdictional, although she identifies inapposite law in support of her argument. The relevant law is the Fifth Circuit’s opinion in *Gorman v. Verizon Wireless Tex., L.L.C.*, 753 F.3d 165 (5th Cir. 2014). In *Gorman*—and against the backdrop of the the Texas Supreme Court’s opinion in *USAA*—the Fifth Circuit confronted the question of whether it had jurisdiction to hear plaintiff’s chapter 21 claims where plaintiff failed to exhaust her administrative remedies through either receipt of a right to sue letter, or waiting 180 days without resolution by the

Texas Workforce Commission (“TWC”). *Gorman*, 753 F.3d at 169. The court found that:

Although not explicit, *USAA* also overturned *Schroeder*’s holding that the TCHRA right to sue letter requirement is jurisdictional. Two reasons lead us to this conclusion. First, the TCHRA’s exhaustion of remedies requirement is not expressly required by the statute but is inferred by the courts from the statute’s structure. See *Schroeder*, 813 S.W.2d at 487. Consequently, the “clear legislative intent” that *USAA* held was necessary to render a provision jurisdictional is lacking. *USAA*, 307 S.W.3d at 306. If the TCHRA’s exhaustion of remedies requirement is not jurisdictional, neither is the right to sue requirement, which is part of the exhaustion requirement.

*3 *Id.* at 169–70. Following *Gorman*’s logic, if the right to sue requirement is not jurisdictional, neither is the requirement to wait 180 days, which is also part of the exhaustion requirement. Accordingly, the court has jurisdiction to hear Wojcik’s chapter 21 claims.

However, exhaustion is still a prerequisite to filing suit. See e.g., *Gorman*, 753 F.3d at 170 (“ ‘the receipt of a right-to-sue letter is a condition precedent’ ”) (quoting *Pinkard v. Pullman–Standard*, 678 F.2d 1211, 1215 (5th Cir. 1982)). Wojcik tries to get around this requirement by noting that she was only required to wait 60 days to file suit under the ADEA, and that chapter 21 is “ ‘intended to correlate with federal law.’ ” Dkt. 41 at 10 (quoting *MD Anderson*, 28 S.W.3d at 24). But the ADEA is not the federal law with which chapter 21 was intended to correlate. “*USAA* emphasized the importance of harmonizing the interpretations of the TCHRA and Title VII.” *Gorman*, 753 F.3d at 170 (emphasis added). Under Title VII, administrative exhaustion requires waiting 180 days. See *Stroy v. Gibson*, 896 F.3d 693, 698 (5th Cir. 2018) (noting that exhaustion is “a precondition to filing suit” and affirming dismissal of plaintiff’s Title VII claim where he waited only 178 days, “two days shy of the statutorily-mandated 180 days”). Accordingly, administrative exhaustion under chapter 21 also requires waiting 180 days, which Wojcik indisputably did not do.⁴

Memorial Hermann has invoked failure to exhaust administrative remedies as an affirmative defense, and Wojcik “does not offer a waiver or estoppel argument to excuse [her] failure to exhaust.” *Stroy*, 896 F.3d at 698. Accordingly, Memorial Hermann is entitled to summary judgment on Wojcik’s chapter 21 claims.⁵

B. Discrimination Claim

The parties agree upon an incorrect standard for *prima facie* age discrimination in a reduction-in-force case. *See* Dkt. 36 at 12; Dkt. 41 ¶ 13. The correct standard is as follows:

In a reduction-in-force case, a party makes out a *prima facie* case of age discrimination by showing “(1) that he is within the protected age group; (2) that he has been adversely affected by the employer's decision; (3) that he was qualified to assume another position at the time of the discharge; and (4) ‘evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.’ ”

McMichael v. Transocean Offshore Deepwater Drilling, Inc., 934 F.3d 447, 456 n.4 (5th Cir. 2019) (quoting *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996)). There is no dispute that Wojcik was within the protected age group, that she was adversely affected by the elimination of her position, and that she was qualified to assume another position had one been available. Dkt. 36 at 18. Because Memorial Hermann fails to discuss the fourth prong of the correct standard, and because “ ‘a plaintiff need only make a very minimal showing,’ ” the court will “assume *arguendo* that [Wojcik] has established a *prima facie* case.” *Nichols*, 81 F.3d at 41 (quoting *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 639 (5th Cir. 1985)).

*4 Although a “*prima facie* case raises an inference of unlawful discrimination,” that inference disappears where the employer articulates “a legitimate, non-discriminatory reason for the layoff, *i.e.*, the reduction in force.” *Id.* (citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 992 (5th Cir. 1996) (en banc)). Here, Memorial Hermann has articulated such a reason. Dkt. 36 at 16. Thus, it falls to Wojcik “to demonstrate that the defendant's articulated rationale is merely a pretext for discrimination.” *Nichols*, 81 F.3d at 41.

“Under the ADEA, the employee must ‘prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.’ ” *Squyres v. Heico Companies, L.L.C.*, 782 F.3d 224, 231 (5th Cir. 2015) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, L. Ed. 2d 105 (2000)). Pretext is established “ ‘either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence.’ ” *Id.* (quoting *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010)). As evidence of pretext, Wojcik

points to comments made by Shelton. Dkt. 41 at 14. However, Shelton was not the person responsible for selecting Wojcik for the RIF—that person was Couture—and Wojcik points to no evidence to suggest otherwise. Wojcik also does not point to any evidence of animus on Couture's part. Instead, Wojcik claims that a “cat's paw” analysis should be applied because Couture was influenced by Shelton's discriminatory animus. Dkt. 41 ¶ 5 n.4; 14.

“To invoke the cat's paw analysis, [Wojcik] must submit evidence sufficient to establish two conditions: (1) that a co-worker exhibited discriminatory animus, and (2) that the same co-worker ‘possessed leverage, or exerted influence, over the titular decisionmaker.’ ” *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 653 (5th Cir. 2004) (quoting *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)). The court assumes, *arguendo*, that Shelton's statements constitute discriminatory animus. Even so, Wojcik's claim still fails because Wojcik cannot show that Shelton possessed leverage or exerted influence over Couture. In support of her cat's paw theory, Wojcik cites to a February 2016 email that Shelton⁶ forwarded to Couture. Dkt. 41-3 at 508. The original email was from a Patient Access Rep who wrote that a certain patient⁷ “wants to stay with you [Shelton], she felt uncomfortable with Irena [Wojcik].” *Id.* Shelton forwarded this email to Couture stating: “See below! This is a perfect patient for a PTA but we can't utilize her.” *Id.* Wojcik also cites to a portion of Couture's deposition (Dkt. 41-3 at 428–29) and an October 2016 email (Dkt. 41-4 at 509), which show that Couture forwarded an announcement about a PTA opening at the Beechnut Clinic to Shelton, asking if Irena would want to be transferred there. Couture claims he forwarded this email because he “knew that Nikki [Shelton] was having difficulty with Irena [Wojcik].” Dkt. 41-2 at 428–29. These are the only portions of the record that Wojcik cites in support of her cat's paw theory, and they do not establish leverage or influence.

*5 Even if Shelton was motivated by discriminatory animus in forwarding the October 2016 email to Couture, the email itself originated not from Shelton, but from a neutral third party concerning a patient's own statement. More importantly, the email predates Couture's selection of Wojcik for the RIF by at least five months.⁸ Most importantly, Wojcik offers no evidence to contradict Shelton and Couture's testimony that Shelton had no role in selecting Wojcik for the RIF. *See* Dkt. 41-3 at 183 (Shelton disclaiming involvement in the RIF decision); *id.* at 444 (Couture testifying that his RIF decision was based on “operational performance of the facility,” “KPI metrics, [Wojcik's] performance,” and “whether or not for any

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– for any employee that we look at, if we pulled her out of the facility, could the other clinicians pick up the volume and not disrupt patient care”). Imputing discriminatory animus from Shelton to Couture requires Wojcik to show that Couture “‘acted as a rubber stamp, or the ‘cat’s paw,’ for the subordinate employee’s prejudice.’” *Laxton v. Gap Inc.*, 333 F.3d 572, 584 (5th Cir. 2003) (quoting *Russell*, 235 F.3d at 227). Wojcik has not carried this burden. Accordingly, Wojcik’s cat’s paw theory fails.⁹

Wojcik also questions the veracity of whether her position was actually eliminated (Dkt. 41 at 11), which if true, might indicate pretext for Wojcik’s termination. As evidence that Wojcik’s position was not actually eliminated, Wojcik points to the fact that Shelton emailed Couture three days after Wojcik’s termination stating that the clinic was “slammed” and that Shelton had “asked [her] therapists to stretch themselves to get patients in since Irena’s departure.” Dkt. 41-3 at 492–93. Wojcik also points out that Shelton requested Zach, “a younger PTA to transfer to Wojcik’s former work location.” Dkt. 41 ¶ 14. The record does not establish that this PTA was in fact younger than Wojcik, but the court will assume, *arguendo*, that he was. Had Zach actually transferred to Shelton’s clinic and assumed Wojcik’s duties, the court might consider the RIF a pretext for Wojcik’s termination. However, Wojcik concedes that “Zach ultimately did not transfer.” *Id.* Wojcik also argues that her position was not really eliminated because her duties were “absorbed by existing younger¹⁰ employees.” *Id.* But Couture explicitly based his decision to eliminate Wojcik’s position in part on the expectation that the other employees would absorb Wojcik’s workload. Dkt. 41-3 at 444. That the clinic struggled in the wake of Wojcik’s departure is at best evidence that Couture miscalculated the clinic’s ability to absorb the work—it is not evidence that the entire RIF was a farce. In sum, Shelton’s complaints about her clinic’s workload following Wojcik’s departure are insufficient to establish that Memorial Hermann’s proffered explanation for terminating Wojcik, *i.e.*, the reduction-in-force, “is false or unworthy of credence.” *Squyres*, 782 F.3d at 231.

C. Retaliation Claim

To establish a *prima facie* case of retaliation under the ADEA, Wojcik must show “(1) that [s]he engaged in [an] activity protected by the ADEA; (2) that there was an adverse employment action; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision.” *Holt v. JTM Indus., Inc.*,

89 F.3d 1224, 1225–26 (5th Cir. 1996) (quoting *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir. 1992)). Memorial Hermann alleges that Wojcik fails to satisfy the first and third prongs of this test. Dkt. 36 at 19.

*6 As to the first prong, Wojcik asserts that she engaged in a protected activity on two occasions. The first was “in a May 2017 meeting with Shelton,” and the second was “when she reported her concerns to Defendant’s compliance office.” Dkt. 41 ¶ 20(a); *see also* Dkt. 41 ¶¶ 3, 6. “With regard to the first element, a plaintiff has engaged in protected activity if [s]he has ‘opposed any practice’ forbidden by the ADEA.” *Heggemeier v. Caldwell Cty., Tex.*, 826 F.3d 861, 869 (5th Cir. 2016) (quoting 29 U.S.C. § 623(d)). As to the May 2017 meeting, Wojcik points the court only to pages 757 and 767 of Appendix A to her response to substantiate that she engaged in a protected activity. Dkt. 41 ¶ 3. The first page merely shows Wojcik testifying to notes from the May 2017 meeting that state “I have talked with the doctor.” Dkt. 41-7 at 757. Nowhere does it reflect what she talked to Shelton about. The second page that Wojcik points to reflects that she told Shelton she felt “isolated” and that it was “all conversation about all the situation is going on in the clinic,” but admits that she “didn’t say by age. I didn’t use the word, no.” Dkt. 41-8 at 767. “[A] vague complaint that does not reference a discriminatory practice does not constitute a protected activity.” *Fuentes v. City of San Antonio Fire Dep’t*, 240 F. Supp. 3d 634, 645 (W.D. Tex. 2017) (citing *Carter v. Target Corp.*, 541 Fed. App’x. 413, 418 (5th Cir. 2013)). Wojcik points this court to no evidence that would suggest her May 2017 meeting with Shelton constituted a protected activity.¹¹ Accordingly, the court finds that Wojcik’s May 2017 meeting with Shelton was not a protected activity.

As for the second occasion, “Memorial Hermann does not contest that Wojcik engaged in ‘protected activity’ when she lodged her complaint through Memorial Hermann’s Compliance Helpline on July 5, 2017, contending that she was being terminated because of her age.” Dkt. 36 at 20. However, Memorial Hermann asserts that “this complaint cannot support her retaliation claim because it came after [Wojcik] was selected for the reduction-in-force.” *Id.* Wojcik admits that this protected activity *followed* receipt of “word that her employment was being terminated.” Dkt. 41 ¶ 6. An adverse action contemplated by an employer before learning of the protected activity “is no evidence whatever of causality.” *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (*per curiam*).

Accordingly, with regard to Wojcik's July 5, 2017 complaint, her retaliation claim fails for lack of causality.

Wojcik appears to also claim retaliation because she "was intentionally not hired into alternate positions within MHHS even though it is their policy to place qualified employees who are affected by a reduction in force." Dkt. 41 ¶ 20(b). Memorial Hermann offers myriad reasons as to why such a claim fails, including a failure to administratively exhaust and that such a claim is not recognized in the Fifth Circuit. Dkt. 36 at 14 n. 8; Dkt. 44 at 9. The court need not address these arguments because any claims that Wojcik could make would clearly fail for other reasons.

If Wojcik is claiming retaliation for the failure to transfer her to the Town and Country clinic, that claim would fail for the same reasons that her termination claim fails: because the decision to not transfer her was made "on or about June 13, 2017" (Dkt. 36 at 8), nearly a month before Wojcik's only protected activity. If Wojcik is claiming retaliation for

Memorial Hermann's failure to hire her into some other positions, she fails to identify those positions, state when she applied for them, identify who was responsible for hiring her into them, or provide any relevant details. Assuming such a claim could be made and that Wojcik had administratively exhausted that claim, with such deficient pleading, Wojcik would fail to state a claim, much less survive summary judgment. Accordingly, all of Wojcik's potential retaliation claims fail.

IV. CONCLUSION

*7 For the reasons stated above, Memorial Hermann's motion for summary judgment is **GRANTED**.

All Citations

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Footnotes

- 1 Also pending is Wojcik's opposed motion to supplement her response (Dkt. 47), which the court construes as a motion for leave to file a surreply, and Memorial Hermann's response in opposition (Dkt. 49). "The Court finds that the Defendant did not raise new legal theories or attempt to present new evidence in the Reply that would necessitate a surreply by Plaintiff." *Smith v. Fluor Enters., Inc.*, No. 4:10-CV-03625, 2013 WL 571787, at *4 (S.D. Tex. Feb. 12, 2013) (Ellison, J.). Nor does the "additional documentary evidence" that Wojcik seeks to add (Dkt. 47 ¶ 4) constitute "exceptional or extraordinary circumstances." *Weems v. Hodnett*, No. 10-CV-1452, 2011 WL 2731263, at *1 (W.D. La. July 13, 2011). The "new evidence" that Wojcik "located" was created by her and her counsel more than a year before the instant motion was filed. Dkt. 47-2. Accordingly, Wojcik's motion (Dkt. 47) is denied.
- 2 The TCHRA nomenclature is disfavored by the Texas Supreme Court. See *Johnson v. Select Energy Servs., L.L.C.*, No. CIV.A. H-11-3486, 2013 WL 5425115, at *1 n.1 (S.D. Tex. Sept. 24, 2013) (Harmon, J.). However, because "many courts still do" use chapter 21 and TCHRA interchangeably, this court will do so also to avoid confusion when discussing case law. *Id.*
- 3 Wojcik's brief quotes Shelton as saying "that 'old people like green tea.'" Dkt. 41 ¶ 3. However, the court notes that these exact words do not appear in the portion of the transcript that Wojcik cites for this "quote." Dkt. 41-6 at 718. The court has quoted the relevant portion above as it appears in the transcript.
- 4 Wojcik does not dispute that she filed this suit 83 days after filing her dual-filing her charge with the EEOC and TWC. Dkt. 36 at 11.
- 5 See *Dillon v. Rogers*, 596 F.3d 260, 272 (5th Cir. 2010) (noting that the Fifth Circuit has "frequently approved of using summary judgment to address exhaustion and other affirmative defenses not enumerated in Rule 12(b)").
- 6 The document reflects Shelton's maiden name: Hawkins. See Dkt. 36 at 4 n.4.
- 7 The patient's name is redacted.
- 8 Couture became aware of the RIF in April 2017. Dkt. 36 at 6. It is not clear from the parties' briefs when precisely between April 2017, when Couture was informed of the head count reduction, and July 2017, when Wojcik's termination became

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effective, that Couture selected Wojcik for the RIF. Accordingly, the time period between this email from Shelton and Wojcik's selection for the RIF could have been longer than five months, but is at least that much.

- 9 Wojcik claims that “both Shelton and Couture intentionally deleted work-related communications from their mobile devices.” Dkt. 41 ¶ 5 n.4. Whether this is true is not an issue before the court. Moreover, Wojcik has not suggested that the court need to resolve this issue in order to decide the instant motion. See *id.* (“Even without this evidence, Wojcik proves a “Cat's Paw” theory, shown below.”).
- 10 Because Wojcik was the oldest employee (Dkt. 41 ¶ 3), any employee who absorbed her duties would necessarily be younger.
- 11 “ ‘Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.’ ” *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 379–80 (5th Cir. 2010) (quoting *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003)).

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